Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

IRINEO TRISTAN MONTOYA,

Petitioner,

v.

WAYNE SCOTT, Director, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether the state trial court judge coerced the jury into answering the two Texas special issues affirmatively in the penalty phase of Petitioner's trial, in violation of Petitioner's Sixth and Fourteenth Amendment rights.

II. Whether Petitioner's allegations, and supporting affidavit from a fellow juror, established "good cause" for discovery, under Rule 6 of the Rules Governing § 2254 Proceedings in the United States District Courts, on Petitioner's claim that he was deprived of his Sixth and Fourteenth Amendment rights because a juror falsely answered and concealed her relationship with the deceased during voir dire.

III. Whether instructing the jury on conspiracy, an offense with which Petitioner was not charged, allowed Petitioner to be convicted without notice of the nature and cause of the accusation in violation of Petitioner's Sixth and Fourteenth Amendment rights.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Irineo Montoya respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 12, 1995. The Court of Appeals denied the Petition for Rehearing on October 10, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, reported at 65 F.3d 405 (5th Cir. 1995), is set forth at Appendix 1-41.

The memorandum decision of the United States District Court for the Southern District of Texas (Vela, D.J.), which is unreported, is set forth at Appendix 42-92.

The opinion of the Texas Court of Criminal Appeals, reported at 810 S.W.2d 160 (Tex. Crim. App. 1989), *cert. denied*, 502 U.S. 961 (1991), is set forth at Appendix 93-131.

JURISDICTION

The Fifth Circuit entered a judgment and an opinion on September 12, 1995, reversing the District Court's grant of habeas relief under 28 U.S.C. § 2254. App. 1. Petitioner filed a Petition for Rehearing on September 26, 1995. The Court of Appeals denied the Petition for Rehearing on October 10, 1995. App. 136. On October 25, 1995, the Court of Appeals denied a stay of mandate to

permit the filing of this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Texas statutory provisions involved are Texas Code of Criminal Procedure Article 37.071(d)(2) & (e), and Texas Penal Code §§ 7.02(a)(2) & (b), and § 19.03(a)(2). The provisions of the United States Constitution involved are the Due Process Clause of the Fourteenth Amendment; the right to an impartial jury under the Sixth and Fourteenth Amendments; and the right to be informed of the nature and cause of an accusation under the Sixth and Fourteenth Amendments. The pertinent text is set out in Appendix 142-143.

STATEMENT OF THE CASE

The jurisdiction of the federal district court was invoked under 28 U.S.C. §§ 1331 & 2254 because Petitioner is in custody pursuant to a judgment of conviction and sentence of death entered by a Texas court in violation of the Constitution of the United States.

Montoya is a citizen of Mexico. The government of Mexico opposes his execution.

A. Proceedings Below.

A jury convicted Montoya of capital murder and sentenced him to death on June 17, 1986, in the 107th

Judicial District Court of Cameron County, Texas. The jury convicted Montoya shortly after his 18th birthday for the stabbing death and robbery of John E. Kilheffer. Montoya was charged with "acting alone or with another person" (Villavicencio) in connection with the crime. The principal evidence used against him at trial was a signed confession obtained through several hours of police interrogation, following his midnight arrest and before Montoya made his initial appearance before any court or any counsel had been appointed to defend him. The confession is in English, a language that Montoya could not speak, read or write.[1]

Although indicted together, Montoya's trial was severed from Villavicencio's because Villavicencio's confession conflicted with Montoya's by stating that a third person had accompanied them and committed the crime. Villavicencio was later acquitted, after his family members contradicted or denied testimony they had given at Montoya's trial.[2]

The Texas Court of Criminal Appeals affirmed Montoya's conviction and sentence on May 24, 1989, *Montoya v. Texas*, 810 S.W.2d 160 (Tex. Crim. App. 1989), and denied rehearing on June 19, 1991. Certiorari was denied

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[1] Montoya challenged the voluntariness of the confession on direct review and in his habeas petition. After conducting an independent review, the District Court found the confession voluntary. District Court Opinion, App. at 76-77. Montoya did not challenge that determination on appeal.

[2] *State v. Villavicencio*, No. 86-CR-68-A, 107th Judicial Dist. Ct. (Cameron County, Texas). The contradictory testimony appears as Exhibits 1 and 2 to Petitioner's Response to Respondent's Motion for Summary Judgment, R. 202-239.

on November 12, 1991, *Montoya v. Texas*, 502 U.S. 961 (1991).

Montoya filed a Petition for Writ of Habeas Corpus, under Texas Code of Criminal Procedure, Article 11.07, at 12:30 p.m. on September 15, 1992, in the 138th Judicial District Court of Cameron County, Texas. The State did not file any response. The Petition was simultaneously filed in the Texas Court of Criminal Appeals. Without conducting any hearing, the state district court denied Montoya's Petition for Writ of Habeas Corpus at 2:35 p.m. the following day – September 16, 1992.

Later that same day, the Texas Court of Criminal Appeals denied Montoya's Motion for Stay of Execution and Application for Writ of Habeas Corpus.

Montoya filed his Original Petition for Stay of Execution and Writ of Habeas Corpus in the District Court on September 16, 1992. This is Montoya's first federal Petition for Writ of Habeas Corpus. The state agrees that the exhaustion requirement has been met for all claims presented. To the extent that any unexhausted claim is presented, the state has waived the exhaustion requirement.[3] The state has not asserted that any of the claims raised here have been procedurally defaulted or would require the application of a "new rule" in violation of the nonretroactivity rules of *Teague v. Lane*, 489 U.S. 288 (1989).

The District Court conditionally granted the Petition on February 4, 1994, on two grounds: (1) the state court

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[3] Respondent's Answer and Motion for Summary Judgment at 13; R. 261; *see also* Fifth Circuit Opinion, App. 3 n.2.

had improperly coerced the jury into returning affirmative answers to both special issues during the sentencing phase and improperly refused to accept the jury's statement that it was unable to reach an answer to either special issue, and (2) the jury was instructed regarding a substantive offense – conspiracy – with which Montoya was not charged, allowing him to be convicted without notice of the nature and cause of the accusation. The District Court denied relief on 25 other claims raised below. The District Court entered judgment on March 29, 1994. The Director appealed. Montoya was granted a CPC on the denied claims and cross-appealed.

The Fifth Circuit entered its decision on September 12, 1995, affirming in part, reversing in part, and remanding with instructions to deny all habeas relief. Petitioner's Motion for Rehearing was denied by the Court of Appeals on October 10, 1995. Petitioner's Motion to Stay Mandate was denied on October 25, 1995.

B. The Coerced Jury.

Montoya's jury began its deliberations on punishment at 1:00 p.m. on June 17, 1986. At 2:40 p.m., a hearing was convened outside the presence of the jury. The trial court read two notes received from the jury. The first note read: "We have not been able to reach a unanimous decision on yes or no." The second note read: "We are awaiting further instructions. We are all definite in our decisions."

The court's response asked the jury to indicate the numerical vote of the jury. Montoya objected that because the jury was unable to reach a verdict, he should be

sentenced to life imprisonment in accordance with Article 37.071(e) of the Texas Code of Criminal Procedure, which provides for a life sentence if the jury is unable to answer any special issue. He also argued that any further communication by the court with the jury would amount to an instruction by the court on the way the jury should vote. The court overruled Montoya's objections.

In response to the trial court's note, the jury responded that it was divided 9 to 3 on Special Issue No. 1, and 10 to 2 on Special Issue No. 2. Montoya again objected and asked that he be given a life sentence. The State argued that the jurors should be instructed to continue their deliberations because they had deliberated for less than two hours. At 2:59 p.m., over Montoya's objection, the court sent the following note to the jury:

> "Would you please deliberate for another thirty minutes to see if you are able to reach an answer to the special issues in accordance with the court's instructions and please report to me after that."

The jury returned an affirmative answer on each special issue 42 minutes after being returned to deliberate (3:41 p.m.), only 12 minutes more than the deadline set by the trial court. *Montoya v. State*, 810 S.W.2d 160, 165-66 (Tex. Crim. App. 1989), *cert. denied*, 502 U.S. 961 (1991), App. 103-104.

After receiving the jury's answer that it was divided ten to two on Special Issue No. 2, and the jury's statement that it was unable to reach an answer as to either special issue, the trial court knew that ten jurors favored an *affirmative* answer to Special Issue No. 2 because ten

jurors favoring a *negative* answer to Special Issue No. 2 would form the majority necessary to answer that special issue.

> "Consistent with the Texas special issues statute, the trial court instructed the jury that if ten jurors or more voted 'no' as to any special issue, then the answer should be 'no' to that issue, while the jury must be unanimous to vote 'yes.' *See* Tex. Crim. Proc. Code Ann. art. 37.071(d). Thus, when a jury reveals that it is divided ten to two or eleven to one on a special issue and that it has not answered that issue, its numerical split will necessarily communicate to the trial court that the majority favors 'yes.' "

Fifth Circuit Opinion, App. 15. Thus, when the court returned Montoya's jury for further deliberations, it knew that a majority of the jurors favored an affirmative answer to Special Issue No. 2. The District Court concluded that:

> "When all of these factors are considered, the totality of the circumstances indicate that the minority jurors were sufficiently coerced and influenced by the trial court's actions, jury notes and supplemental charges as to render the trial jury's decision invalid at the sentencing phase."

District Court Opinion, App. at 57. The Fifth Circuit, reviewing the District Court's coercion finding under a de novo standard as a question of law instead of under a clearly erroneous standard as a finding of fact, reversed:

> "On balance, we conclude that the state trial court's instruction to the jury to continue deliberating for thirty minutes, following its inquiry as to the numerical division of the jury with

> respect to each special issue, was not under the circumstances so coercive as to have rendered Montoya's trial fundamentally unfair."

App. 16. The Fifth Circuit acknowledged that it "ha[d] not previously addressed identical circumstances in this circuit." *Id.*

C. The Prevaricating Juror.

All jurors were asked at voir dire whether they knew the alleged victim, John E. Kilheffer. No juror admitted any knowledge of him. Statement of Facts, Vol. IX, 12-13. In fact, juror Norma Gonzalez knew Kilheffer, had known him for a while, and admitted this to a fellow juror, Patricia Loomis. Affidavit of Patricia Loomis, App. 144.

Gonzalez's failure to answer truthfully on voir dire that she knew Kilheffer concealed critical information regarding grounds for striking her for cause, information necessary to Montoya's intelligent exercise of his peremptory strikes, and her potential biases and prejudices. She showed no similar reluctance in describing her views of the death penalty: "Well, I feel that if they really deserve it they should get it. You know, if they are responsible for that crime, especially the murder of a person, I agree with." Statement of Facts, Vol. XIII, 1250-51.

The Affidavit of Juror Patricia Loomis was attached to the First Amended Petition for Writ of Habeas Corpus. The Affidavit is dated October 12, 1992 – nearly a month *after* the state habeas proceedings had concluded.

Montoya asked for leave to depose the prevaricating juror, Norma Gonzalez.[4] Montoya sought to depose Gonzalez, in part, "to establish the fact that she failed to disclose at voir dire that she knew the alleged victim."[5] In response, the Director argued (i) that there should be no discovery because: "a Petitioner in a habeas action bears the burden of establishing a *prima facie* claim for relief *before* discovery can properly be granted,"[6] and, (ii) with regard to the Gonzalez deposition, that the request "constitute[s] a fishing expedition and should be denied."[7]

The Director then moved for summary judgment, arguing that (i) "[t]here is no proof in the record to support Montoya's assertion that juror Gonzalez failed to tell the truth on voir dire," and (ii) even if juror Gonzalez failed to tell the truth, there is no proof her reasons for not telling the truth affected her impartiality.[8] In response to the summary judgment motion, Montoya argued:

> "The Court should defer any action on the Motion for Summary Judgment until after Mr.

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[4] Petitioner's First Motion for Discovery Under Habeas Rule 6; R. 386-410. Montoya also asked the District Court to defer action on the merits until he obtained necessary discovery. Petitioner's Response to Respondent's Motion for Summary Judgment at 1-2; R. 153-154.

[5] Motion for Discovery at 12; R. 397.

[6] Respondent's Opposition to Petitioner's Motion for Discovery at 2.

[7] Respondent's Opposition to Petitioner's Motion for Discovery at 7.

[8] Respondent's Answer, Motion for Summary Judgment and Supporting Brief at 90; R. 338.

> Montoya obtains the discovery sought in his prior motion.
>
> " . . . Until Mr. Montoya has been granted the discovery he seeks by that motion, he is not in a position to fully respond to the Motion for Summary Judgment. Habeas Rule 6 is specifically designed to assist Mr. Montoya in gathering the evidence necessary to establish the contentions made in his First Amended Petition for Writ of Habeas Corpus. Addressing the Motion for Summary Judgment without affording Mr. Montoya an adequate opportunity for discovery is prohibited by Federal Rule of Civil Procedure 56."[9]

He also argued that:

> "Absent discovery granted by this Court, Mr. Montoya does not have available to him any compulsory process or other method of gathering the necessary information from any witnesses or organizations which are unwilling to cooperate or, particularly, to sign an affidavit and thereby place their testimony in a form that can be presented in this Court at this stage of the proceedings. The fact issues to be resolved through discovery in an evidentiary hearing are many:
>
> - Whether juror Gonzalez failed to tell the truth on voir dire;

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[9] Petitioner's Response to Respondent's Motion for Summary Judgment ¶ 2; R. 153-154.

- When juror Gonzalez realized that she was a friend of the deceased; and

- How well Gonzalez knew the deceased."[10]

The District Court denied relief on this claim without granting the requested discovery or an evidentiary hearing. The District Court found that "[t]he affidavit of Loomis does not indicate when Gonzalez realized she knew the victim" and "fails to demonstrate that the juror failed to answer honestly a material question."[11] The District Court also found that this claim did not meet the exhaustion requirement of § 2254. The exhaustion finding is wrong because the state conceded exhaustion and waived the exhaustion requirement for any non-exhausted claims.[12]

The Fifth Circuit analyzed this claim under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), and required Montoya to show (i) that a juror failed to answer honestly a material question on voir dire, and (ii) that a correct response would have provided a valid basis for a challenge for cause. Fifth Circuit Opinion, App. 30; *see* 464 U.S. at 556 (plurality opinion).

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[10] Petitioner's Response to Respondent's Motion for Summary Judgment ¶ 117; R. 195.

[11] District Court Opinion, App. at 88 & n.33.

[12] Respondent's Answer and Motion for Summary Judgment at 13; R. 261. Respondent filed this concession and waiver *after* the First Amended Petition for Writ of Habeas Corpus, with the attached Loomis Affidavit, had been filed with the District Court.

With regard to the first prong of the *McDonough* test, the Fifth Circuit concluded:

> "The allegations in Juror Y's affidavit may suggest that Juror X realized during the trial that she knew Kilheffer, but they do not necessarily suggest that Juror X realized when she was asked that she knew Kilheffer. Thus, it is speculative whether Juror X (1) lied to get on the jury; or (2) honestly but mistakenly failed to realize she knew Kilheffer when asked. During her examination by counsel at voir dire on an unrelated issue, Juror X referred to the victim as 'this man from Padre Island' and not by name. Thus, Montoya's allegations with respect to the first prong may, to some degree, be speculative, and speculative allegations are insufficient to entitle a habeas petitioner to discovery and an evidentiary hearing."

Fifth Circuit Opinion, App. 32 n.28. With regard to the second prong of the *McDonough* test, the Fifth Circuit concluded that a correct response would not have constituted a valid basis for challenging the prevaricating juror for cause. Fifth Circuit Opinion, App. 32. Thus, the Fifth Circuit affirmed the District Court's denial of discovery:

> "Because Montoya's allegations fail to establish a prima facie case under *McDonough*, the District Court did not abuse its discretion in denying Montoya's request for discovery and an evidentiary hearing."

Fifth Circuit Opinion, App. 35.

D. The Conspiracy Instruction.

Montoya was charged by indictment with "unlawfully, intentionally and knowingly caus[ing] the death of John E. Kilheffer, the deceased, by stabbing the deceased with a knife, which then and there in the manner of its use or intended use was capable of causing serious bodily injury or death, and the said defendant [was] then and there in the course of committing and attempting to commit the offense of robbery of John E. Kilheffer. . . . " This was the only offense with which Montoya was charged.

The jury in this case was instructed on the law of parties *and* conspiracy at the guilt/innocence phase of the trial:

8.

> All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.
>
> A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense.
>
> . . .

9.

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, then all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out the conspiracy. Capital murder, murder, robbery, and attempted robbery are felonies.

. . .

10.

Now, if you find from the evidence beyond a reasonable doubt that [Montoya] and [Villavicencio] entered into an agreement to commit the offense of robbery, as defined, of John E. Kilheffer, and pursuant to that agreement, they did carry out their conspiracy and that on or about the 17th day of November, 1985 in Cameron County, Texas, while in the course of committing such robbery, [Villavicencio] intentionally caused the death of John E. Kilheffer, by stabbing him with a knife with the specific intent to kill John E. Kilheffer, and that the defendant [Montoya] pursuant to the conspiracy, if any, with the intent to promote and assist [Villavicencio] in the commission of said robbery, then and there, at the time of the stabbing, was acting with and aiding, or attempting to aid, [Villavicencio] to rob John E. Kilheffer, and that the stabbing of John E. Kilheffer, if any, was an offense that should have been anticipated as a result of the carrying out of the conspiracy,

> then you will find the defendant, [Montoya], guilty of Capital Murder.

Tr., Vol. 1 at 86-87. The instructions in ¶ 8 are drawn from Texas Penal Code § 7.02(a)(2). The instructions in ¶ 9 are drawn from Texas Penal Code § 7.02(b).

Under Texas law, capital murder requires an intentional killing. Texas Penal Code § 19.03(a)(2); *Ruiz v. State*, 579 S.W.2d 206 (Tex. Crim. App. 1979). As the District Court correctly concluded, Appendix 61-63:

> "The effect of the trial court's mix of instructions from § 7.02(a) and § 7.02(b) in Montoya's case was to lower the required culpable mental state required for a capital offense under his indictment without giving him notice prior to the court's charge.[10] [[10]If the jury believed that his co-defendant actually murdered the victim, Montoya's indictment necessarily provided he could only be convicted of capital murder under a theory of aiding and abetting, it did not allege anything else. Aiding and abetting is a criminal theory that requires a showing of specific mental intent.] Once the jury was instructed on conspiracy and its related criminal responsibility repercussions the jury was able to convict the petitioner for the acts and motives of the co-defendant without finding the intent required in aiding and abetting.[11] [[11]Co-conspirators may be held liable for the acts of the other co-conspirators, even though they had no intent to commit the offense, so long as they meet the requirements for conspiracy. V.T.C.A. § 7.02(b).] This allowed the jury to convict the defendant with a lower standard of mental state than his indictment charged and eventually receive the death penalty.

> "Further, the separate offense of conspiracy is limited to one category lower than the most serious felony that is the object of the conspiracy. V.T.C.A. § 15.02(d). Therefore the separate offense of conspiracy *alone* could not result in the death penalty. When conspiracy is properly alleged in the indictment co-conspirators could in fact be liable for the capital crimes of their co-conspirators and thus receive the death penalty without the finding of intent. In those instances the Constitution requires that they be given notice pursuant to the Sixth and Fourteenth Amendments. In Montoya's case no such notice was given. The effect was to allow a conviction for capital murder at a lesser level of mental state than the indictment required."

The Fifth Circuit reversed, finding that the indictment placed Montoya on notice that he could be convicted under Texas' "law of parties," and that a conspiracy theory of criminal liability was merely a "law of parties" instruction. Fifth Circuit Opinion, App. 21-22 & n.18.

REASONS FOR GRANTING THE WRIT

I. The state trial court judge coerced the jury into answering the two Texas special issues affirmatively in the penalty phase of Petitioner's trial.

"Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S.

231, 241 (1988). This case presents the archetypal elements of coercion:

- Inquiry into the numerical division of the jury.
- Knowledge of the answer favored by the majority.
- Instruction to the jurors to deliberate further.
- A fixed deadline for the jury to report back.
- Prompt return of a verdict on the deadline.
- Identical jury answers on both issues.

See, e.g., United States v. Lindell, 881 F.2d 1313, 1321-22 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (inquiry into the numerical division of the jury, deadline set for the jury's decision, verdict promptly returned); *Jones v. Norvell*, 472 F.2d 1185, 1186 (6th Cir.), *cert. denied*, 411 U.S. 986 (1973) (identification of a deadlocked jury's majority-minority count, jury charged to continue deliberations, speedy return of a verdict after the charge).

In *Brasfield v. United States*, 272 U.S. 448 (1926), the Court concluded that an inquiry into the jury's numerical division necessitated reversal because it was generally coercive and almost always brought to bear "in some degree, serious although not measurable, an improper influence upon the jury." *Id.* at 450. *Brasfield* is "instructive as to the potential dangers of jury polling," *Lowenfield*, 484 U.S. at 240, and properly employed as part of the coercion analysis. *Jimenez v. Myers*, 12 F.3d 1474, 1477-79 (9th Cir. 1993), *cert. denied*, 116 S. Ct. 63 (1995).

> "The coercive impact of even a modest *Allen* charge is heightened when preceded by any

> inquiry as to the jury's numerical division. When that is done, the impression is inherently conveyed to the jury that the revelation of their division prompted the giving of the subsequent verdict-urging instruction and that it is, therefore, directed toward the minority jurors."[13]

The return of the verdict soon after receiving the instruction to deliberate further suggests coercion. *Lowenfield*, 484 U.S. at 240; *United States v. United States Gypsum Co.*, 438 U.S. 422, 462 (1978) (swift resolution of the issues after prior indications of deadlock "gives rise to serious questions").

The trial court's instruction that the jury continue its deliberations was also improperly coercive because the jury's statement to the court in the two notes that it was unable to reach an answer to either special issue may decide the punishment. Article 37.071(e) of the Texas Code of Criminal Procedure provides that if the jury is unable to answer any special issue, the defendant is to be assessed a life sentence. "[T]his obviously weighs in the constitutional calculus." *Lowenfield*, 484 U.S. at 238. The Fifth Circuit improperly regarded this circumstance as solely an error of state law and failed to give it any weight in its coercion analysis. Fifth Circuit Opinion, App. 20 n.17.

Unlike *Lowenfield*, where the Court emphasized that "the inquiry as to the numerical division of the jury was not as to how they stood on the merits," 484 U.S. at 240,

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[13] *Cornell v. Iowa*, 628 F.2d 1044, 1048 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

the inquiry here was on the merits. The jury had unequivocally stated its deadlock: "We are all definite in our decisions." The supplemental instruction here also drew an immediate objection. *See id.* (absence of objection indicated absence of coercion). Under the totality of the circumstances here, any reasonable juror would conclude that the court's requirement for further deliberations was an indication that some deference was owed to the opinion of the majority of the other jurors, *see Allen v. United States*, 164 U.S. 492 (1896), thus yielding a coerced verdict.

Because this is true under de novo review of the District Court's coercion finding, the circumstances do not even suggest that the finding was "clearly erroneous," Fed. R. Civ. P. 52(a); the proper standard of review which should have been applied by the Court of Appeals. Rule 52(a) applies in habeas proceedings. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). Once the District Court had independently evaluated the jury coercion issue, a mixed question, its finding was entitled to deferential review under Rule 52(a).

II. Petitioner's allegations, and supporting affidavit from a fellow juror, established "good cause" for discovery on Petitioner's claim that he was deprived of his rights to a fair and impartial jury because a juror falsely answered and concealed her relationship with the deceased during voir dire.

The right to a trial by a fair and impartial jury lies at the very heart of due process. *Irvin v. Dowd*, 366 U.S. 717, 721-722 (1961). Although the right to trial by an impartial jury "prescribes no specific tests," *United States v. Wood*, 299 U.S. 123, 133 (1936) (Sixth Amendment), the Fifth

Circuit denied discovery because Montoya did not present a prima facie case under *McDonough*, 464 U.S. at 556 (plurality opinion).[14] Montoya's First Amended Petition for Writ of Habeas Corpus and the Loomis Affidavit established "good cause" for discovery.

A prima facie showing requires neither conclusive nor ultimately persuasive evidence. Instead, it consists only of either:

> "(1) the establishment of a legally required presumption that may be rebutted; or (2) the plaintiff's burden of producing enough evidence to permit the fact-trier to infer the fact at issue."[15]

A.

As to the first prong of *McDonough*, the Loomis Affidavit is sufficient to support a reasonable inference that Gonzalez failed to answer honestly a material question

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[14] The Fifth Circuit concurring opinion's reliance on *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), is misplaced. *Keeney* is founded on the statutory exhaustion requirement of 28 U.S.C. § 2254. 504 U.S. at 9-10. The Director clearly and unequivocally waived the exhaustion requirement of § 2254. Respondent's Answer and Motion for Summary Judgment at 13; R. 261 ("the Director waives the exhaustion requirement of the federal habeas statute"). The Director filed this waiver *after* Montoya filed his First Amended Petition for Writ of Habeas Corpus, with the Loomis Affidavit attached.

[15] Bryan A. Garner, Dictionary of Modern Legal Usage 434 (1987), citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981).

on voir dire. The Fifth Circuit recognized that this inference may be drawn from the Affidavit. App. 32 n.28.

As the non-movant in the summary judgment proceeding below, Montoya was entitled to have every reasonable inference in his favor drawn from the evidence.[16] Because Gonzalez's prevarication is a reasonable inference from the Loomis Affidavit, Montoya established a prima facie case under the first prong of the *McDonough* test.[17]

B.

As to the second prong of *McDonough*, the Fifth Circuit concluded incorrectly that the truthful answer *by itself* must "have constituted a valid basis for challenging Juror X for cause" and that, because the mere fact that Gonzalez knew Kilheffer would not have rendered her service constitutionally impermissible on grounds of bias or prejudice, Montoya failed to meet his burden. App. 32-35.

The Loomis Affidavit supports a reasonable inference that Gonzalez had a bias or prejudice. The inference is drawn not from the fact that she knew Kilheffer (i.e., the substance of the truthful answer) but instead from (i) her

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[16] "Whether the record raises a genuine factual dispute is decided by the same standards used to decide a Rule 56 motion for summary judgment." *East v. Scott*, 55 F.3d 996, 1002 (5th Cir. 1995).

[17] Facts which raise a reasonable inference that a habeas petitioner is entitled to relief are facially sufficient to establish a prima facie claim. *East*, 55 F.3d at 1001.

failure to tell the truth, (ii) her refusal to answer when questioned about the matter:

> "I then asked her how she got on the jury if she knew the victim since we had been asked about that before we were selected, but she would no longer talk about it,"[18]

(iii) the fact that "Gonzalez was one of the first to say that the defendant deserved the death penalty," Loomis Affidavit ¶ 4, App. 144; and (iv) Gonzalez's failure to notify the court after she became aware of her false answer, *McCoy v. Goldston*, 652 F.2d 654, 658-59 (6th Cir. 1981). The circumstances led Loomis, herself, to "the impression [Gonzalez] may have been biased towards awarding the death penalty due to her personal connection with the victim." Loomis Affidavit ¶ 4, App. 145.

An inference of bias or prejudice not only can, but should, be drawn from a juror's failure to tell the truth during voir dire. *See, e.g., United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989) (juror 1 submitted affidavit that juror 2 disclosed relationships, after jury selection, which juror 2 had denied during voir dire; "the juror's motive in lying on the voir dire was precisely to prevent defense counsel or the magistrate from acting on information the juror believed might lead to her dismissal from

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[18] Loomis Affidavit ¶ 3, App. 144. "When a person's knowledge or belief is a fact in issue, conduct and word utterances may betray the knowledge or belief of the actor or speaker." 2 John H. Wigmore, Evidence in Trials at Common Law § 266, at 97 (Chadbourn rev. ed. 1979). "Silence, when the assertion of another person would naturally call for a dissent if it were untrue, may be equivalent to an assent to the assertion." *Id.* § 292, at 229.

the case . . . if such misconduct occurred, it reflected an impermissible partiality on the juror's part"); *United States v. Scott*, 854 F.2d 697, 699 (5th Cir. 1988) (juror's failure to answer honestly on voir dire "in itself constitutes bias"); *McCoy*, 652 F.2d at 659 (6th Cir. 1981) (presuming bias "when a juror deliberately concealed information or gave a purposefully incorrect answer"); *McDonough*, 464 U.S. at 556 ("in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial") (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring). The Court has consistently recognized that bias may be inferred from certain circumstances. *Smith v. Phillips*, 455 U.S. 209, 223 (1982) (O'Connor, J., concurring) ("[n]one of our previous cases preclude the use of . . . implied bias"); *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (plurality opinion) ("due process is denied by circumstances that create the likelihood or the appearance of bias"); *United States v. Wood*, 299 U.S. 123, 134 (1936) (recognizing use of implied bias in Sixth Amendment analysis).

Because Gonzalez's bias or prejudice is a reasonable inference from the Loomis Affidavit, and the existence of bias or prejudice would have been a valid basis for challenging Gonzalez for cause, Montoya established a prima facie case under the second prong of the *McDonough* test.

C.

Finally, Montoya did not have to "establish a prima facie case under *McDonough*", Fifth Circuit Opinion, App. 35, to be entitled to discovery under Habeas Rule 6. Rule

6(a)'s "good cause" standard permits the use of discovery to *establish* a prima facie case for relief.

Discovery is proper "where specific allegations before the court show reason to believe that the Petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief." *East*, 55 F.3d at 1001 (granting discovery because "the record [wa]s silent," 55 F.3d at 1002, on a necessary element of the claim), quoting Advisory Committee Note to Rule 6 of the Rules Governing § 2254 Cases. Thus, "a court's blanket denial of discovery is an abuse of discretion if discovery is 'indispensable to a fair, rounded, development of the material facts.' " 55 F.3d at 1001, quoting *Coleman v. Zant*, 708 F.2d 541, 547 (11th Cir. 1983) (remanding a claim of jury prejudice for discovery since the voir dire record was facially insufficient to determine the claim). Here, in contrast, the Fifth Circuit used any silence in the record to conclude that Montoya is not entitled even to discovery.

Gonzalez's deposition is indispensable to a fair, rounded, development of the material facts. The conclusion that the Loomis Affidavit, which would unquestionably require an evidentiary hearing on juror bias in even a civil suit in the Fifth Circuit, *see Vezina v. Theriot Marine Serv., Inc.*, 554 F.2d 654 (5th Cir. 1977), does not merit any further inquiry through discovery in a death penalty case, is inconsistent with the spirit and purpose of Habeas Rule 6. *See Smith*, 455 U.S. at 215 ("[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias").

"[I]t would be an aberration in the administration of justice if a juror could simply remain silent during voir dire and fail to disclose potentially disqualifying information." *McCoy*, 652 F.2d at 658. Juror Gonzalez' failure to disclose her relationship with Kilheffer prevented, as a practical matter, the full exploration of her bias and prejudice during voir dire. What was Montoya's defense counsel to do? Ask follow up questions regarding a relationship she had denied? Because she denied the threshold inquiry, the questions whose answers may have disqualified her were never asked and Montoya was deprived of "a fair and meaningful opportunity during *voir dire*" to determine whether Gonzalez was biased. *Smith*, 455 U.S. at 226 (Marshall, J., dissenting, joined by Brennan and Stevens, JJ.).

The Fifth Circuit compounds this problem, and, perhaps, permits Gonzalez to accomplish her purposes through falsity, by denying any inquiry of Gonzalez regarding her conduct. Habeas Rule 6 is designed to allow discovery to establish a claim. The Fifth Circuit's approach essentially requires Montoya to have all the evidence he needs before he may have discovery.

Once a claim is properly before the District Court, a habeas petitioner should be treated like any civil litigant for purposes of the right to a fact-development procedure where the procedure is necessary to prove the facts supporting his claim. *Cf. Keeney*, 504 U.S. at 14-15 (1992) (O'Connor, J., dissenting). Discovery depositions are available in habeas corpus proceedings. *Id.* at 14, citing 28 U.S.C. § 2246.

Because habeas corpus discovery is designed to aid courts in determining the validity of the Petitioner's claims, it often can add – and may in fact be indispensable – to the reliability of habeas corpus proceedings in capital cases. For this reason, liberal use of discovery is appropriate in such cases. *Ross v. Kemp*, 785 F.2d 1467, 1478-79 (11th Cir. 1986); *Coleman*, 708 F.2d at 547.

The heavy burden that current law places on state prisoners to allege and litigate all possibly available constitutional claims in their initial federal habeas corpus petition creates the need for liberal use of all available procedural devices to enable habeas petitioners to investigate, prepare and present their claims. *Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir.), *cert. denied*, 503 U.S. 1011 (1992).

The Advisory Committee Note to Rule 6 approves the use of discovery in appropriate cases *before* an evidentiary hearing has been granted. In *Blackledge v. Allison*, 431 U.S. 63 (1977), the Court cited with approval the Advisory Committee's suggestion that federal judges utilize prehearing discovery as one means of determining whether there is a factual basis for the Petitioner's claims. *Id.* at 81, citing Advisory Committee Note to Rule 6 of the Rules Governing § 2254 Cases.

Blackledge suggests discovery before deciding whether an evidentiary hearing is appropriate whenever the claim on which discovery is sought is not so "palpably incredible [or] patently frivolous or false as to warrant summary dismissal." *Blackledge*, 431 U.S. at 76, 82-83. Before dismissing facially adequate allegations short of an evidentiary hearing, a district judge should ordinarily

seek testimony from all persons likely to have first-hand knowledge. *Blackledge*, 431 U.S. at 82 n.25.

Montoya's discovery request fell squarely within the scope of discovery permitted under Rule 6, *see, e.g., Love v. Jones*, 923 F.2d 816, 819 (11th Cir. 1991); *Warden v. Gall*, 865 F.2d 786, 787-88 (6th Cir. 1989) (deposition of juror permitted); *Coleman*, 708 F.2d at 547-48, and should have been granted.

III. Instructing the jury on conspiracy, an offense with which Montoya was not charged, allowed Montoya to be convicted without notice of the nature and cause of the accusation.

The Constitution, by way of the Sixth Amendment right to notice of the nature and cause of the accusation and the Fourteenth Amendment right to due process of law, forbids a conviction for an offense of which the defendant had no prior notice. *Dunn v. United States*, 442 U.S. 100 (1979); *In re Oliver*, 333 U.S. 257 (1948). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (citations omitted). Once a defendant has been given notice of specific charges, that must remain the theory of prosecution upon which the prosecution rests.[19]

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[19] *See, e.g., Dunn*, 442 U.S. at 106 ("[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due

An indictment is constitutionally insufficient under the Sixth Amendment if no reasonable construction of the indictment would charge the offense for which the jury instructions permit conviction. *McKay v. Collins*, 12 F.3d 66, 69 (5th Cir. 1994). Respondent does not dispute that Montoya's indictment did not charge him with conspiracy and that the jury instructions allowed Montoya to be convicted on a conspiracy theory of criminal liability.

Montoya had no notice that the nature of the charge involved a conspiracy or the implications which arise therefrom. Montoya premised his defense on the lack of any intent on his part that the victim be either robbed or stabbed. The evidence at trial (Montoya's confession) showed that ¶ Villavicencio told Montoya that he was going to rob the gringo; ¶ Villavicencio at that point displayed a knife; ¶ Villavicencio began stabbing the victim with the knife and telling him to move from the driver's seat of the vehicle; ¶ Montoya pulled the victim to the back seat to attempt to prevent further fighting; ¶ Villavicencio attempted to drive the vehicle while continuing to stab at the victim from across the back seat of the vehicle; and ¶ Villavicencio continued to stab the victim after he had been pulled from the vehicle and

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process"). *See also Sheppard v. Rees*, 883 F.2d 795 (9th Cir. 1989) (ordering grant of writ of habeas corpus where defendant charged with premeditated and deliberated murder and trial proceeded on this theory of murder, only to grant, over defense objection, a request for an instruction on felony-murder); *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986) (ordering grant of writ where defendant charged with first degree murder but subjected to conviction on theory of murder by torture).

dragged into a grapefruit orchard. Texas Court of Criminal Appeals Opinion, App. 93-95.

Because Montoya's statement admitted participation in enjoying the fruits of the robbery, and because of the charge contained in the indictment, Montoya knew that he would be facing charges of acting in concert under Texas Penal Code § 7.02(a)(2). However, he did *not* have notice that he could or would be held accountable for the acts and *motives* of Villavicencio on a conspiracy theory, which allowed the jury to impute to him the premeditation and intent of Villavicencio in order that the charge become capital murder.

The jury charge instructed the jury, under one construction, to impute to Montoya the "stabbing" of the victim, not the intentional killing of the victim. Hence, even if Montoya legitimately could have been convicted of a felony-murder based on the evidence received and the law provided the jury, the conviction for capital murder went beyond both the law and the evidence. As the jury in this case not only received the acting in concert instruction, but also received the instruction on conspiracy for which the defendant received no notice, the court may not simply conclude that the jury's verdict was based solely on the former instruction but not the latter. *See, e.g., Eaton v. Tulsa*, 415 U.S. 697 (1974) (per curiam). It violates both the notice provision of the Sixth Amendment and the due process clause of the Fourteenth Amendment to convict on a basis broader than the facts and law as presented allow. *Dunn*, 442 U.S. at 105; *Cole*, 333 U.S. at 201.

CONCLUSION

This Petition raises serious questions regarding both the merits of Montoya's claims and the procedures used in the courts below to adjudicate those claims. On the merits, the Court of Appeals erred in reversing the District Court's grant of habeas relief because (i) Montoya's jury was coerced and (ii) the indictment did not provide constitutionally sufficient notice of the conspiracy theory of criminal liability, thus allowing Montoya to be convicted of capital murder under a charge which, under one construction, required proof only of the lesser, noncapital offense of conspiracy.

On procedure, both courts below erred by requiring Montoya to have all the evidence necessary to establish a prima facie case before having the benefit of discovery. This misinterprets the "good cause" standard, and purpose, of Habeas Rule 6. Finally, the District Court's finding of jury coercion, a mixed question, should have been reviewed under a deferential standard, not de novo. For these reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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Irineo MONTOYA, Petitioner-Appellee, Cross-Appellant,

v.

Wayne SCOTT, Director, Texas Department of Criminal Justice,

Institutional Division, Respondent-Appellant, Cross-Appellee.

No. 94-60184.

United States Court of Appeals, Fifth Circuit.

Sept. 12, 1995.

Affirmed in part, reversed in part and remanded with instructions.

Garwood and Edith H. Jones, Circuit Judges, filed specially concurring opinion.

Appeals from the United States District Court for the Southern District of Texas.

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

Wayne Scott, Director of the Texas Department of Criminal Justice, appeals, and Irineo Montoya cross-appeals, from the district court's conditional grant of Montoya's petition for a writ of habeas corpus under 28 U.S.C. § 2254 (1988). We affirm in part, reverse in part, and remand with instructions to deny relief.

I

Montoya and a friend, Juan Villavicencio, killed John Kilheffer after Kilheffer picked them up hitchhiking home from the Port of Brownsville, Texas. In his confession, Montoya claimed that he held Kilheffer in the back seat while Villavicencio, who had pushed Kilheffer out of the driver's seat and was driving Kilheffer's vehicle, stabbed Kilheffer. However, a witness at trial testified that Villavicencio had told him, in Montoya's presence, that Montoya had held Kilheffer in the back seat and stabbed him, and further that while Villavicencio told the story, Montoya made faces as if he were laughing. Montoya and Villavicencio stole Kilheffer's jewelry, clothes, and wallet and left his body in a grapefruit grove.

A jury convicted Montoya of capital murder. At the sentencing phase of Montoya's trial, the State introduced evidence that during the months in and around the time of the murder, Montoya had raped one woman and sexually assaulted and robbed another at knife point. Montoya called witnesses who testified that he was a responsible and respectful young man and that they had never seen him with a weapon or acting disrespectfully toward women. The jury answered "yes" to the first two Texas special issues,[1] and the trial court sentenced

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[1] The Texas Code of Criminal Procedure in effect at the time of Montoya's trial provided:

> On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that

Montoya to death. *See* Tex.Code Crim.Proc.Ann. art. 37.071(e) (West 1981).

The Texas Court of Criminal Appeals affirmed Montoya's conviction and sentence, and the United States Supreme Court denied certiorari. Montoya then filed a petition for a state writ of habeas corpus. The state trial court entered findings of fact and conclusions of law the day after Montoya filed his petition. Later that day, the Texas Court of Criminal Appeals denied the writ based on the trial court's findings of fact and conclusions of law. The next day, Montoya filed a petition for a federal writ of habeas corpus, and the district court stayed Montoya's execution pending its consideration of Montoya's claims.[2]

The district court granted Montoya's petition on two of his claims and denied relief on the other twenty-five. The court also issued a certificate of probable cause to appeal. Scott appeals from the district court's judgment with respect to the two claims on which the district court granted Montoya habeas relief, and Montoya cross-appeals with respect to six of the claims on which the district court denied relief.

> the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. . . .

Tex.Code Crim.Proc.Ann. art. 37.071(b) (West 1981). The third special issue, which pertains to provocation by the victim, did not apply and was not submitted.

[2] The State waived the exhaustion requirement of 28 U.S.C. § 2254(b) (1988).

II

"We freely review the district court's legal conclusions, but '[t]he factual findings of a federal district court in a habeas action should not be set aside unless they are clearly erroneous.' " *Self v. Collins*, 973 F.2d 1198, 1203 (5th Cir.1992) (footnote and citations omitted) (quoting *Guzman v. Lensing*, 934 F.2d 80, 82 (5th Cir.1991)), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1613, 123 L.Ed.2d 173 (1993).

A

Scott argues first that the district court erroneously held that the state trial court judge coerced the jury into answering the Texas special issues affirmatively. We review de novo a district court's determination that a habeas petitioner's trial court coerced the jury into rendering a verdict. *Boyd v. Scott*, 45 F.3d 876, 882 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1964, 131 L.Ed.2d 855 (1995).

After deliberating on the special issues for an hour and forty minutes, the jury foreman sent the court two notes. The first read: "We have not been able to reach a unanimous decision on yes or no." The second, which the court received minutes later, read: "We are awaiting further instructions. We are all definite in our decisions." The court proposed asking the jury, "Ladies and Gentlemen of the Jury: Without telling me for what answer the jury has cast its votes, could you please indicate what the numerical vote is for each special issue?" While the court discussed this proposal with counsel, the jury sent a third note indicating that they were no longer deliberating and were awaiting further instructions. Defense counsel

moved for a directed verdict, and the court, which noted that the jury had been deliberating for only an hour and forty minutes, overruled the motion and sent its note inquiring as to the jury's vote.

The jury responded that it was divided nine to three on the first special issue and ten to two on the second special issue. Defense counsel renewed his motion for a directed verdict, but the court sent the following note to the jury: "Would you please deliberate for another 30 minutes to see if you are able to reach an answer to the special issues in accordance with the Court's instructions and please report to me after that." Forty minutes later, the jury informed the court that it had reached a verdict.

The district court held that the state trial court's request that the jury continue deliberating for thirty minutes, following its inquiry into the jury's numerical division, unconstitutionally coerced the jury. In so holding, the district court relied primarily on our decision in *United States v. Lindell*, 881 F.2d 1313 (5th Cir.1989), *cert. denied*, 496 U.S. 926, 110 S.Ct. 2621, 110 L.Ed.2d 642 (1990). The district court's reliance on *Lindell* was misplaced, however, because our decision in *Lindell* was an exercise of our federal supervisory powers over the use of "*Allen* charges"[3] in federal criminal trials. *See id.* at

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[3] "The phrase '*Allen* charge' refers to supplemental jury instructions that urge deadlocked juries to forego their differences in order to reach a unanimous verdict. The original *Allen* charge urged the minority of the jury to consider the views of the majority in an effort to determine whether the minority views were reasonable under the circumstances." *Boyd*, 45 F.3d at 878 (citing *Allen v. United States*, 164 U.S. 492, 501, 17 S.Ct. 154,

1320-21. On direct review of a federal criminal conviction, we "scrutinize the Allen charge for compliance with two requirements: '(1) the semantic deviation from approved "Allen" charges cannot be so prejudicial to the defendant as to require reversal, and (2) the circumstances surrounding the giving of an approved "Allen" charge must not be coercive.' " *Lindell*, 881 F.2d at 1321 (quoting *United States v. Bottom*, 638 F.2d 781, 787 (5th Cir.1981)).

In the habeas context, in contrast, the standard for disturbing a state conviction is considerably stricter; a habeas petitioner must establish that the court's charge, under the totality of the circumstances, was so coercive as to have unconstitutionally rendered the petitioner's trial fundamentally unfair. *Boyd*, 45 F.3d at 881.[4] Thus, we

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157, 41 L.Ed. 528 (1896)); *see also United States v. Anderton*, 679 F.2d 1199, 1202 (5th Cir.1982) ("An *Allen* charge, as all criminal law devotees know, is a sharp punch to the jury, reminding them of the nature of their duty and the time and expense of a trial, and urging them to try again to reach a verdict."). An *Allen* charge is also referred to as a "dynamite" charge. *See, e.g., United States v. Bailey*, 468 F.2d 652, 666 (5th Cir.1972) ("By whatever label identified – the *Allen* charge, the dynamite charge, the third degree instruction, the shotgun instruction, or the nitroglycerin charge – the standard supplemental instruction has been well-received by the nation's trial court judges. The charge is used precisely because it works, because it can blast a verdict out of a jury otherwise unable to agree that a person is guilty."), *aff'd on reh'g en banc*, 480 F.2d 518 (5th Cir.1973).

[4] The Supreme Court has explained the distinction between the standard for reversible error on direct appeal from a federal criminal conviction and the constitutional standard for challenging a state court conviction in habeas corpus as follows:

> [E]ven substantial unanimity among federal courts of appeals that the instruction in question ought not to

evaluate the constitutionality of a state court's supplemental instructions by comparing them to other charges challenged on constitutional grounds in habeas corpus cases, not by focusing on deviations from charges approved of on direct appeal. *See id.* at 881-84.[5] In *Boyd*, we reversed a district court's grant of habeas relief based on an allegedly coercive *Allen* charge, holding that while similar, "almost identical" instructions had been held reversible error on direct appeal, the supplemental charge was not so coercive as to have rendered the petitioner's trial fundamentally unfair. *Id.* at 884.

> be given in United States district courts within their respective jurisdictions is not, without more, authority for declaring that the giving of the instruction makes a resulting conviction invalid under the Fourteenth Amendment. Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

Cupp v. Naughten, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

[5] *See also United States v. Cheramie*, 520 F.2d 325 (5th Cir.1975).

> This Court, pursuant to its general supervisory powers, can restrict the utilization in this Circuit of supplemental instructions more narrowly than would otherwise be required by the United States Constitution. However, because this supervisory jurisdiction does not extend to state courts, we apply only the constitutional standard in habeas corpus actions arising from state criminal prosecutions.

Id. at 330 n. 6 (citations omitted).

The trial court's supplemental instruction in Montoya's case was not a traditional *Allen* charge; it did not contain what we have called "the most troublesome feature of the Allen charge – the exhortation to the minority to reexamine its views in light of the majority's arguments," *United States v. Cheramie*, 520 F.2d 325, 330-31 (5th Cir.1975), and it did not "remind[ ] [the jury] of the nature of their duty and the time and expense of a trial, and urg[e] them to try again to reach a verdict," *United States v. Anderton*, 679 F.2d 1199, 1202 (5th Cir.1982).[6] The trial court simply stated, "Would you please deliberate for another 30 minutes to see if you are able to reach an answer to the special issues in accordance with the Court's instructions and please report to me after that."

Regardless of the label we attach to the court's supplemental instruction, we emphasize that the instruction

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[6] *See United States v. Warren*, 594 F.2d 1046, 1050 (5th Cir.1979) (noting that court's instruction to jury to continue deliberating, in response to two notes suggesting jury was deadlocked, was not traditional *Allen* charge); *see also United States v. Williams*, 626 F.2d 697, 704 (9th Cir.1980) (holding that court's restatement of its instructions after jury notified trial judge of its inability to reach a verdict was not modified *Allen* charge), *cert. denied*, 449 U.S. 1020, 101 S.Ct. 586, 66 L.Ed.2d 482 (1980). *Cf. Cheramie*, 520 F.2d at 329 n. 3 ("It might be argued that the terse charge objected to here is so lacking in the elements composing either the Fifth Circuit's approved version or the original 'Allen' pronouncement that this Court should not subsume its analysis under the banner of the traditional 'Allen' cases. For example, no reference was made by the trial judge regarding the expense of trial, or the need for minority reconsideration of their votes. While this view presents an interesting definitional question, the denomination of the charge is of only tangential importance.").

contained none of the explicit "dynamite" language contained in more traditional *Allen* charges. In *Boyd*, we reviewed a habeas petitioner's challenge to an *Allen* charge in which the court instructed the jury to continue its deliberations, informing the jury that its verdict "should represent the opinion of each individual juror," but explicitly instructing the dissenting jurors to reconsider their views in light of those of the majority. *Id.* at 878. The petitioner specifically objected to the following language: "The issue has been tried out very ably by both sides, who have presented this evidence to you, and *a decision has to be reached by a jury. You are that jury,* and it seems to me that you ought to make every effort to arrive at a unanimous verdict and reach a conclusion." *Id.* at 878. We noted that the trial court's instruction resembled other *Allen* charges that we had held constituted reversible error on direct review. However, we held that the court's charge did not deprive the defendant of a fundamentally fair trial, reasoning that the instruction, in context, "did more to *encourage* the jurors to reach a verdict than it did to coerce them." *Id.* at 883-84.[7]

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[7] We also stated that:

> In addition, after reviewing the additional circumstances surrounding the charge, we are even more firmly convinced that any coerciveness generated by the court's instruction fell short of the level of a constitutional violation. The jury deliberated between 4 1/2 and 5 hours before it notified the court that it was deadlocked. Only after hearing that the jury was deadlocked did the court read the *Allen* charge and encourage the jury to continue deliberating. Approximately one hour and twenty minutes after hearing that charge the jury returned with its verdict.

Id. at 884.

In *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), the Supreme Court held that the state trial court had not unconstitutionally coerced the jury when it (1) inquired as to how many jury members felt that further deliberations would help them arrive at a verdict; and then (2) gave the jury a modified *Allen* charge.[8] The Supreme Court held that, although the jury returned its verdict thirty minutes after the court gave them the supplemental instruction, "the combination of the polling of the jury and the supplemental instruction was not 'coercive' in such a way as to deny petitioner any constitutional right." *Id.* at 241, 108 S.Ct. at 552. The Court specifically noted that the supplemental instruction did not inform the jury that it was required to reach a verdict. *Id.* at 239, 108 S.Ct. at 551-52.

In *Bryan v. Wainwright*, 511 F.2d 644 (5th Cir.), *cert. denied*, 423 U.S. 837, 96 S.Ct. 63, 46 L.Ed.2d 55 (1975), we

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[8] The court instructed the jury:

> When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a verdict if you can do so without violence to that individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Id. at 235, 108 S.Ct. at 549.

held that a district court had erroneously granted habeas relief on a claim that the state trial court had coerced the jury into rendering a verdict. In that case, the trial court had given the jury an *Allen* charge in which the court explicitly instructed the minority jurors to reconsider their views. After six hours, the court again called the jury into the courtroom, "whereupon the following discussion took place:

> THE COURT: Ladies and Gentlemen of the Jury, do you believe that you can arrive at a verdict in a short period of time? JUROR: I believe we're closer to it than we were. I have that idea. The COURT: If I give you another 20 minutes, will that be enough? You want to give it a try for 20 minutes? JUROR: All right. THE COURT: All right. We'll give you another 20 minutes and see if you can arrive at a verdict within the next 20 minutes. You can retire to the jury room.

Id. at 645. After seventeen minutes, the jury returned a guilty verdict. *Id.* We held that the court's instruction, combined with the ensuing dialogue regarding an additional twenty-minute period of deliberations "was not so prejudicial as to make the trial fundamentally unfair." *Id.* at 646.

The trial court's instruction in this case was substantially less coercive than the *Allen* charges held constitutional in *Boyd* and *Bryan*. Unlike the instructions in *Boyd* and *Bryan*, the state trial court's instruction in Montoya's case was not directed to the minority or dissenting jurors. Unlike the instruction in *Boyd*, the trial court's instruction did not contain language suggesting that the jury was

required to reach a verdict. Instead, the court's instruction simply asked the jury to deliberate for another half hour "to see if you are able to reach an answer to the special issues."[9]

Montoya further argues that the fact that the jury returned its verdict forty minutes after receiving the

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[9] We note that the state trial court's supplemental instruction also did not contain countervailing language, like that contained in the *Allen* charges at issue in *Boyd*, *Lowenfield*, and *Scott*, to the effect that a juror should not merely acquiesce in the majority's view. In the direct appeal context, we have suggested that such countervailing language is required in a traditional *Allen* charge, *see Posey v. United States*, 416 F.2d 545, 552 (5th Cir.1969), *cert. denied*, 397 U.S. 946, 90 S.Ct. 965, 25 L.Ed.2d 127 (1970), and at least one circuit court has "looked with favor" on such language in reviewing state court supplemental instructions in the habeas context. *See Ellis v. Reed*, 596 F.2d 1195, 1200 (4th Cir.1979).

Montoya does not argue that the trial court erred in not including such language, and we have found no authority suggesting that it is constitutionally required, either in the context of a traditional *Allen* charge, or a simple instruction to continue deliberating like the charge in this case. Further, we have found no evidence that such language, in the absence of the "dynamite" language of a traditional *Allen* charge, is required in federal criminal trials in this circuit. *See United States v. Straach*, 987 F.2d 232, 242-43 (5th Cir.1993) (holding that trial court's instruction to jury to continue deliberating after jury informed court that it had reached verdict on counts two through five but was unable to reach verdict on count one was not reversible error where trial court's instruction "simply said, 'Members of the jury: Considering the length of the trial and the amount of evidence to be considered, the Court requests that you continue your deliberations in an effort to reach a verdict on all counts' "); *United States v. Warren*, 594 F.2d 1046, 1050 (5th Cir.1979) (holding that trial court's instructions to "continue deliberations" were not traditional *Allen* charges and not reversible error).

court's supplemental instruction suggests it was coerced by the court's supplemental instruction. While the time a jury deliberates after receiving a supplemental instruction is a factor to consider, *Lowenfield*, 484 U.S. at 240, 108 S.Ct. at 552, we do not agree that the fact that the jury arrived at unanimous answers to the special issues after forty minutes of deliberations indicates that the court's instruction was unconstitutionally coercive, *see id.* (holding supplemental instruction constitutional where jury rendered verdict thirty minutes after receiving instruction); *Boyd*, 45 F.3d at 884 (same, one hour and twenty minutes); *Bryan*, 511 F.2d at 645 (same, seventeen minutes).[10]

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[10] Montoya also argues that the trial court's "deadline" rendered its supplemental instruction coercive. The trial court did not instruct the jury that it was required to reach a verdict in thirty minutes; rather, it instructed to jury to continue deliberating for thirty minutes and then report back to the court. Under the circumstances, such an instruction may in fact have rendered the supplemental instruction less coercive by suggesting to the holdout jurors that the end was in sight. In any event, while a deadline on jury deliberations may constitute reversible error on direct review, *see United States v. Amaya*, 509 F.2d 8 (5th Cir.1975), *cert. denied*, 429 U.S. 1101, 97 S.Ct. 1125, 51 L.Ed.2d 551 (1977), a deadline does not necessarily render a state criminal trial fundamentally unfair, *see Bryan*, 511 F.2d at 645. In *Bryan*, the trial court sua sponte summoned the jury into the courtroom and gave the jury an *Allen* charge. Six hours later, the court again called the jury into the court room, and gave the jury "another 20 minutes" to "see if you can arrive at a verdict within the next 20 minutes." *Id.* at 645. We held that the trial court's conduct "was not so prejudicial as to make the trial fundamentally unfair." *Id.* at 646.

Montoya also contends that the trial court's supplemental instruction was rendered unconstitutionally coercive because it followed the court's inquiry into the jury's numerical division. The trial court asked the jury, "Without telling me for what answer the jury has cast its votes, could you please indicate what the numerical vote is for each special issue?", and the jury responded that it was divided nine to three on the first special issue, and ten to two on the second.

Although in *Brasfield v. United States*, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926), the Supreme Court held that such an inquiry was *per se* reversible error on direct review of a federal criminal conviction, *id.* at 450, 47 S.Ct. at 135-36, every court of appeals that has addressed the issue has held that *Brasfield's per se* rule does not apply in the habeas context, *see Williams v. Parke*, 741 F.2d 847, 851 (6th Cir.1984), *cert. denied*, 470 U.S. 1029, 105 S.Ct. 1399, 84 L.Ed.2d 787 (1985); *Locks v. Sumner*, 703 F.2d 403, 406-07 (9th Cir.), *cert. denied*, 464 U.S. 933, 104 S.Ct. 338, 78 L.Ed.2d 307 (1983); *United States ex rel. Kirk v. Director, Dep't of Corrections*, 678 F.2d 723, 727 (7th Cir.1982); *Cornell v. Iowa*, 628 F.2d 1044, 1048 (8th Cir.1980), *cert. denied*, 449 U.S. 1126, 101 S.Ct. 944, 67 L.Ed.2d 112 (1981); *Ellis v. Reed*, 596 F.2d 1195, 1200 (4th Cir.), *cert. denied*, 444 U.S. 973, 100 S.Ct. 468, 62 L.Ed.2d 388 (1979).[11] We agree with those courts that an inquiry into the numerical division of

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[11] *See also Lowenfield*, 484 U.S. at 240 n. 3, 108 S.Ct. at 552 n. 3 ("Our decision in *Brasfield* makes no mention of the Due Process Clause or any other constitutional provision. The Federal Courts of Appeals have uniformly rejected the notion that *Brasfield's per se* reversal approach must be followed when reviewing state proceedings on habeas corpus." (citing cases)).

the jury warrants federal habeas relief only if, under the totality of the circumstances, the inquiry, coupled with a subsequent charge, rendered the petitioner's trial fundamentally unfair. *See, e.g., Williams,* 741 F.2d at 851; *Cornell,* 628 F.2d at 1048.

Montoya correctly points out that an inquiry into the numerical division of the jury during the penalty phase of a Texas capital trial creates additional risks not present in a non-capital trial or in the guilt/innocence phase of a capital trial. Consistent with the Texas special issues statute, the trial court instructed the jury that if ten jurors or more vote "no" as to any special issue, then the answer should be "no" to that issue, while the jury must be unanimous to vote "yes." *See* Tex.Crim.Proc.Code Ann. art. 37.071(d). Thus, when a jury reveals that it is divided ten to two or eleven to one on a special issue and that it has not answered that issue, its numerical split will necessarily communicate to the trial court that the majority favors "yes." In denying habeas relief based on a state court's inquiry into the jury's numerical division, other circuits have emphasized that the court did not ascertain which verdict the majority favored. *Compare Jones v. Norvell,* 472 F.2d 1185, 1185-86 (6th Cir.) (per curiam), *cert. denied,* 411 U.S. 986, 93 S.Ct. 2275, 36 L.Ed.2d 964 (1973) (holding that state trial court coerced jury in part because it ascertained the jury's numerical division and how the majority voted) *with Williams,* 741 F.2d at 851 (holding that state trial court had not coerced jury and distinguishing *Jones* in part on grounds that court inquired as to jury's numerical division without asking how many jurors favored a guilty verdict); *see also Cornell,* 628 F.2d at 1048 (holding state trial court's inquiry into numerical

division of jury constitutional in part because court did not inquire and was not told whether majority favored acquittal).

In Montoya's case, although the court asked the jury, "*Without telling me for what answer the jury has cast its votes,* could you please indicate what the numerical vote is for each special issue?" (emphasis added), the jury's answer risked communicating which answer the majority favored because it was divided ten to two on the second special issue. However, this risk was substantially undercut by the fact that the jury did not, as Montoya contends, clearly communicate to the trial court that it was unable to reach an answer with respect to either special issue. The jury's note simply stated, "We have not been able to reach a unanimous decision on yes or no." Furthermore, regardless of whether the trial court suspected that a majority of the jury favored "yes" on each special issue, it is by no means certain that the jury would have deduced that its numerical division implied to the court how each side stood. Therefore, the court's inquiry, which explicitly disclaimed a desire to know how the jury stood, was less coercive than an explicit request as to which answer the majority favored.

On balance, we conclude that the state trial court's instruction to the jury to continue deliberating for thirty minutes, following its inquiry as to the numerical division of the jury with respect to each special issue, was not under the circumstances so coercive as to have rendered Montoya's trial fundamentally unfair. While we have not previously addressed identical circumstances in this circuit, the weight of authority in other circuits supports

our holding. *Compare Williams*, 741 F.2d at 851-52;[12] *Cornell*, 628 F.2d at 1048;[13] *Ellis*, 596 F.2d at 1197;[14]

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[12] In *Williams*, the state trial court had given the jury a modified *Allen* charge after inquiring into the jury's numerical division, which the jury informed the court was seven to five. The jury returned a verdict within thirty minutes of receiving the instruction. The Sixth Circuit noted that the state trial court's instruction did not "expressly remind jurors of their continuing right to disagree," *id.* at 851, which the Sixth Circuit had held on direct appeal to be "one of the most important parts of the *Allen* charge," *id.* (quoting *United States v. Scott*, 547 F.2d 334, 337 (6th Cir.1977)). However, the Sixth Circuit distinguished its direct appeal cases as "turning on this court's exercise of its supervisory powers." *Id.* at 851. It also emphasized that the state trial court's instruction did not single out minority jurors and did not suggest that the jury was required to agree. *Id.* at 850-51. The court thus held that the state trial court's instruction, following an inquiry into the numerical division of the jury, while "less than ideal," *id.* at 850, was not "so coercive as to deprive petitioner of his constitutional rights," *id.* at 852.

[13] In *Cornell*, the Eighth Circuit reversed the district court's grant of habeas relief in a case involving an inquiry into the jury's numerical division (seven to five) and a balanced *Allen* charge. The court held that "neither the inquiry nor the *Allen* charge, nor the two in combination, was coercive of the jury's ultimate verdict of guilty." The court emphasized that:

> The judge did not ask nor was he told whether the majority at that time favored acquittal or which offense was being considered. The supplemental charge that was given was mildly worded and did not address itself to the minority members of the jury. Finally, nearly five hours elapsed between the time the supplemental instruction was given and the time the jury returned its verdict.

Id. at 1048.

[14] In *Ellis*, the Fourth Circuit affirmed a denial of habeas relief in a case in which the state trial court had inquired into the jury's numerical division, which the court learned was eleven to

Locks, 703 F.2d at 407[15] with *Jones*, 472 F.2d at 1186.[16]

In *Jiminez v. Myers*, 40 F.3d 976 (9th Cir.1993) (per curiam), *petition for cert. filed*, 63 U.S.L.W. 3861 (U.S. May

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one, and had given the jury a mild *Allen* charge. The jury returned a verdict within eight minutes after receiving the supplemental instruction. The Fourth Circuit held that "neither the inquiry as to the numerical division of the jury nor the supplemental modest charge had the coercive effect attributed to them by the appellant," and noted that "we look with particular favor upon the two admonitions in the modified *Allen* charge that no jury surrender any conscientious convictions." *Id.* at 1200.

[15] In *Locks*, the Ninth Circuit affirmed the denial of habeas relief in a case in which the state trial court inquired as to the jury's numerical division (eight to three to one) and then dismissed the jury for the weekend. *Id.* at 405. The Ninth Circuit held that the trial court's inquiry into the jury's numerical division was not coercive, noting that "he did not ask whether the jurors in the majority were for acquittal or a guilty verdict; the judge did not follow the inquiry with any statement imploring the jury to come to a decision; and the jury was not sent back to continue deliberations, but was dismissed for the weekend." *Id.* at 407.

[16] In *Jones*, the Sixth Circuit reversed a district court's denial of habeas relief in a case in which the trial court had inquired not only as to the split but also the majority's inclination and asserted that "it is your duty to reach a verdict if you can possibly do so – you 12 people are the only ones that can do it. The Court can't do it, nor anyone else. You twelve people are the only ones." *Id.* at 1185. In addition, the jury had returned a guilty verdict within five minutes of receiving the court's supplemental charge. The Sixth Circuit held that the state trial court's "identification of a deadlocked jury's majority-minority count" and "coercive jury charge," and "the speedy return of a verdict" constituted a totality of circumstances which violated the petitioner's constitutional rights. *Id.* at 1186.

22, 1995) (No. 94-1934), Montoya's strongest support for his claim, the Ninth Circuit reversed a denial of habeas relief on facts similar in some respects to those in this case. However, in *Jiminez*, the state trial court had repeatedly inquired into the jury's numerical split, expressed approval of the jury's movement from nine-to-three to eleven-to-one, and then instructed the jury to continue deliberating until the end of the day. *Id.* at 979. The Ninth Circuit held that the state trial court's "comments and conduct amounted to giving the jury a de facto *Allen* charge." *Id.* at 980. The court then reasoned that the trial court's instruction "sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity." *Id.* at 981.

Although the facts in *Jiminez* are distinguishable on the grounds that the trial court in this case did not repeatedly inquire into the jury's "split" or express approval of its movement toward unanimity, we also question the persuasiveness of the Ninth Circuit's reasoning. *See id.* at 981 (Kozinski, J., dissenting) (characterizing as "sheer phantasy" majority's assessment of the effect of the trial court's instructions).

In sum, guided by *Lowenfield*, *Boyd*, and *Bryan*, we hold that the trial court's inquiry into the numerical division of the jury and its supplemental instruction to continue deliberating for another thirty minutes were not so coercive as to have rendered Montoya's trial fundamentally unfair. Although its inquiry into the numerical division of the jury was potentially more coercive than such an inquiry would have been in the context of a

jury's deliberations over a guilt/innocence verdict, the court's supplemental instruction to continue deliberating for thirty minutes "to see if you can reach an answer to the special issues" was less coercive than the instructions at issue in *Boyd* and *Bryan*. While it lacked protective language assuring minority jurors that they were not required to relinquish firmly held convictions, the court's instruction contained none of the "dynamite" language of a traditional *Allen* charge. Under the totality of circumstances surrounding the court's communications with the jury, we hold that the trial court's instruction was not so coercive as to have rendered Montoya's trial fundamentally unfair. Consequently, we hold that the district court erred in granting Montoya's request for habeas relief on the grounds that the state trial court unconstitutionally coerced the jury into answering "yes" to the special issues.[17]

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[17] Montoya also argues that the trial court's instruction to the jury to continue deliberating was improper because under the Texas death penalty statute, "if the jury is unable to answer any special issue, the defendant is to be assessed a life sentence," *Montoya v. State*, 810 S.W.2d 160, 166 (Tex.Crim.App.1989), *cert. denied*, 502 U.S. 961, 112 S.Ct. 426, 116 L.Ed.2d 446 (1991). Montoya contends that the trial court erred in not sentencing him to life imprisonment after the jury first indicated that it had deadlocked. The Texas Court of Criminal Appeals rejected this claim, holding that "[u]nless the record reveals that the trial court abused its discretion in holding the jury for deliberations, reversal is not mandated." *See id.* In any event, errors of state law are not grounds for granting habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991).

To the extent Montoya argues that the trial court's failure to render a life imprisonment sentence violated his constitutional rights, we note that we rejected a similar argument in *Monroe v.*

B

Scott also challenges the district court's holding that the state trial court unconstitutionally instructed the jury on Texas' "law of parties" because Montoya had not been charged with conspiracy to commit murder. The trial court instructed the jury, under Texas' "law of parties" statute, Tex.Penal Code Ann. § 7.02 (West 1994), on an "aiding and abetting" theory of criminal liability, *see* § 7.02(a)(2), and a conspiracy theory of criminal liability, *see* § 7.02(b).[18] Under section 7.02(b) of the Texas Penal Code:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was

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Blackburn, 748 F.2d 958 (5th Cir.1984), *cert. denied*, 476 U.S. 1145, 106 S.Ct. 2261, 90 L.Ed.2d 706 (1986), a case in which the state trial court, in a Louisiana capital case, did not impose a life sentence after the jury deadlocked during the sentencing phase of petitioner's trial. We noted that the Louisiana courts had rejected Monroe's claim as a matter of state law, and we held: "We accept that decision and reject the argument that a constitutional deprivation occurred." *Id.* at 961.

[18] Montoya's brief erroneously suggests that a "law of parties" instruction is distinct from a conspiracy instruction. He contends, quoting the court's instruction, that the court instructed the jury on the law of parties and conspiracy. In fact, the court instructed the jury on aiding and abetting, under § 7.02(a)(2), and conspiracy, under § 7.02(b), both of which are "law of parties" instructions. *See Jackson v. State*, 898 S.W.2d 896, 898 (Tex.Crim.App.1995) (referring to "the law of parties as it is set out in both . . . § 7.02(a)(2) and in § 7.02(b)").

> committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Tex.Penal Code Ann. § 7.02(b). We have held that Texas' "law of parties" may support a conviction for capital murder. *See Skillern v. Estelle*, 720 F.2d 839, 846-47 (5th Cir.1983), *cert. denied*, 469 U.S. 873, 105 S.Ct. 224, 83 L.Ed.2d 153 (1984).

Our recent decision in *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 711, 130 L.Ed.2d 618 (1995), forecloses the district court's holding. Like Montoya, Jacobs was convicted of capital murder after the trial court gave the jury a "law of parties" conspiracy instruction under § 7.02(b). *Id.* at 1322. Jacobs argued "that the trial court erred by charging the jury at the guilt phase on a conspiracy theory of liability even though the indictment contained no such charge." *Id.* at 1329. We rejected this argument, which is identical to Montoya's, stating:

> We have held that "one who has been indicted as a principal may, on proper instructions, be convicted on evidence showing only that he aided and abetted the commission of the offense." *United States v. Robles-Pantoja*, 887 F.2d 1250, 1255 (5th Cir.1989) (citations omitted). Similarly, it was not error for Jacobs to be indicted as a principal and then to be convicted under the "law of the parties."

Id. Under *Jacobs*, Montoya is not entitled to habeas relief based on the trial court's § 7.02(b) instruction.

III

A

In his cross-appeal, Montoya argues first that the district court erroneously rejected his eighth claim, in which he contended that the trial court's jury instructions prevented the jury from considering his mitigating evidence that he was not the principal actor in the murder. "The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner." *Boyde v. California*, 494 U.S. 370, 377-78, 110 S.Ct. 1190, 1196, 108 L.Ed.2d 316 (1990) (citing *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)).

Montoya argues that because the trial court instructed the jury on Texas' "law of parties" but failed to clarify that the "law of parties" does not apply during the penalty phase of his trial, the jury was precluded from considering or giving effect to his mitigating evidence that Villavicencio and not he killed Kilheffer. In *Boyde*, the Supreme Court clarified its standard for such a claim: "We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380, 110 S.Ct. at 1198; *see Johnson v. Texas*, ___ U.S. ___, ___, 113 S.Ct. 2658, 2669, 125 L.Ed.2d 290 (1993) (holding that petitioner's *Penry/Eddings/Lockett* claim with respect to Texas special issues was governed by *Boyde* standard).

We have repeatedly rejected claims similar to Montoya's, holding that if a jury believed that the defendant's accomplice killed the murder victim, it could answer "no" to either of the first two Texas special issues. *See Harris v. Collins*, 990 F.2d 185, 188-89 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3069, 125 L.Ed.2d 746 (1993); *Stewart v. Collins*, 978 F.2d 199, 201 (5th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1951, 123 L.Ed.2d 656 (1993); *Bridge v. Collins*, 963 F.2d 767, 770 (5th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3044, 125 L.Ed.2d 729 (1993). In *Stewart* we held:

> [The petitioner] does not satisfy his burden of demonstrating a "reasonable likelihood that the jury . . . appli[ed] the challenged instructions in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 371, 110 S.Ct. 1190, 1191, 108 L.Ed.2d 316 (1990). The punishment phase issues allowed the jury to give mitigating effect to [the petitioner's] alleged non-triggerman status if they chose to credit his version of the offense.

Id. at 201. Our holding in *Stewart* forecloses Montoya's claim.

B

Montoya argues next that the trial court's instructions unconstitutionally prevented the jury from giving mitigating effect to the fact that if he had been sentenced to life in prison, he would have been required to serve twenty years in prison before becoming eligible for parole. At the penalty phase, the trial court instructed the

jury not to consider Montoya's eligibility for parole, as Texas law required it to do, *O'Bryan v. Estelle*, 714 F.2d 365, 388 (5th Cir.1983) ("Under Texas law, a jury may not consider the possibility of parole in its deliberation on punishment."), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984). Montoya's claim relies on the Supreme Court's holding in *Simmons v. South Carolina*, ___ U.S. ___, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), that when a defendant convicted of capital murder is statutorily ineligible for parole, the due process clause entitles him to rebut the prosecution's "future threat to society" evidence with his statutory ineligibility for parole. *Id.* at ___-___, 114 S.Ct. at 2194-96.[19]

Montoya's *Simmons* claims are foreclosed by recent circuit authority rejecting an extension of *Simmons* beyond situations in which a defendant is statutorily ineligible for parole. In *Allridge v. Scott*, 41 F.3d 213 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995), a habeas petitioner had been prevented from arguing to the jury that he was almost certain not to be granted parole. He argued that under *Simmons*, the trial court's exclusion of his evidence and "refusal to instruct the . . . jury that [petitioner] almost certainly would serve the remainder of his life in prison" violated his fourteenth amendment right to due process.

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[19] Although in *Simmons* the Supreme Court specifically limited its holding to the due process clause of the fourteenth amendment, expressing "no opinion on the question whether [its] result [was] also compelled by the Eighth Amendment," *id.* at ___ n. 4, 114 S.Ct. at 2193 n. 4, Montoya states his *Simmons* claim as both a fourteenth amendment claim and an eighth amendment claim.

Id. at 220. We rejected his claim, reading *Simmons* "to mean that due process requires the state to inform a sentencing jury about a defendant's parole ineligibility when, *and only when*, (1) the state argues that a defendant represents a future danger to society, and (2) the defendant is legally ineligible for parole." *Id.* at 222 (footnote omitted); *see also id.* at 222-23 (rejecting similar claim asserted as eighth amendment *Penry* claim). We also noted that an extension of *Simmons* to encompass situations in which a defendant was eligible for parole would be barred under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Id.* at 222 n. 11.[20]

C

Montoya also argues that the district court erroneously denied him discovery and an evidentiary hearing

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[20] In *Kinnamon v. Scott*, 40 F.3d 731 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 660, 130 L.Ed.2d 595 (1994), we similarly declined to extend *Simmons* beyond statutory ineligibility for parole:

> [Petitioner] next asserts constitutional error in his inability to argue to the jury in sentencing that if spared the death penalty [petitioner] would be required to serve a minimum of 20 calendar years without good time before becoming eligible for parole. [Petitioner] rests this claim on *Simmons*. . . . If we were to ignore the absence of a contemporaneous objection and the bar of *Teague* . . . , we would not extend *Simmons* beyond cases in which the sentencing alternative to death is life without parole.

Id. at 733.

on his claim that one of the jurors who convicted Montoya knew the victim. "The opportunity for an evidentiary hearing in a federal habeas corpus proceeding is mandatory only where there is a factual dispute which, if resolved in the petitioner's favor, would entitle the petitioner to relief and petitioner has not received a full and fair evidentiary hearing in state court." *East v. Scott*, 55 F.3d 996, 1000 (5th Cir.1995) (citing *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *overruled in part on other grounds, Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992)).

In *East*, we reviewed a district court's denial of a request for discovery and an evidentiary hearing, and we follow a similar approach in this case. First, we examine the legal basis for the petitioner's claim to determine whether the petitioner's allegations state a prima facie due process claim. *East*, 55 F.3d at 1000-01. Second, we determine whether the petitioner's allegations, which must be specific and may not be speculative or conclusory, establish "good cause" for discovery under Rule 6(a) of the Federal Rules Governing § 2254 Cases. *Id.* at 1001-02.[21]

Thus, the first question we must address is whether Montoya's allegations are sufficient to establish a prima

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[21] If so, then a remand is in order for the petitioner to pursue his requested discovery. Then, after discovery, the district court will be required to determine whether an evidentiary hearing is necessary, that is, whether genuine issues of material fact remain. *Id.* at 1002 (citing *Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1257, 131 L.Ed.2d 137 (1995)).

facie due process claim. In his amended habeas petition, Montoya alleged:

> All jurors were asked at voir dire whether they knew the alleged victim, John E. Kilheffer. No juror admitted any knowledge of him. In fact, [Juror X] knew Kilheffer, had known him for a while, and admitted this to a fellow juror. Her failure to respond to the court's inquiry on voir dire concealed critical information regarding grounds for striking her for cause and her potential biases and prejudices. . . .
>
> [Juror X's] failure to tell the truth on voir dire is itself evidence of bias. The law implies bias in this situation. In the unlikely event that the court does not find bias as a matter of law, Petitioner will demonstrate actual bias at the evidentiary hearing.

Record on Appeal, vol. 3, at 523.[22] In response to the State's motion for summary judgment, Montoya

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[22] Montoya supported these allegations with an affidavit by another juror, Juror Y. In the affidavit, Juror Y states:

> At some point during the trial (I believe it was during the guilt/innocence phase deliberations), another juror, who was a young, short, hispanic girl, and I were talking about where we were from and where we worked. This juror, whose first name is ___ and I believe her last name is ___, said she was working, or had worked, at the Yacht Club Restaurant in Port Isabel.
>
> When I learned that [Juror X] worked at the Yacht Club Restaurant, I mentioned that the victim was from South Padre Island and might have frequented the restaurant. I asked [Juror X] if she had ever met him. She responded that she had known him and, in fact, had known him for a while. I got the impression that [Juror X] had known him personally because, for

described his claim in these terms: "[Juror X's] concealment of her acquaintance with the deceased was obviously a failure to answer honestly a material question on voir dire. Further, her friendship with the deceased certainly would have formed the basis of a challenge for cause." Record on Appeal, vol. 1, at 195.[23]

> one thing, she referred to him by his first name. I then asked her how she got on the jury if she knew the victim since we had been asked about that before we were selected, but she would no longer talk about it.
>
> At one point, [Juror X] said she was not sure she believed in the death penalty and she also told me that she believed criminals could be rehabilitated. On the other hand, [Juror X] was one of the first to say the defendant deserved the death penalty. In fact, the main reason I am coming forth with this information is because I had the impression she may have been biased towards awarding the death penalty due to her personal connection with the victim.

Record on Appeal, vol. 3, at 531-32. We note that although Scott contends that the affidavit improperly lacked a stamp indicating the expiration date of the notary public's commission, the original affidavit, which appears in the district court record, does contain such a stamp.

[23] Montoya's discovery request was similarly limited to this issue:

> In Claim 24, Mr. Montoya alleges that he was deprived of his right to a fair and impartial jury because one juror concealed during voir dire that she knew the alleged victim. This claim is supported by the affidavit of a fellow juror. . . . That affidavit documents a conversation with juror X in which she disclosed the fact that she knew the alleged victim – something she had denied at voir dire. Her deposition is necessary to establish the fact that she failed to disclose at voir dire that she knew the alleged victim.

Montoya's claim that Juror X dishonestly failed to reveal her acquaintance with Kilheffer and that this prevented Montoya from challenging her for cause is grounded in the Supreme Court's decision in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). In that case, a civil case on direct review, a juror had allegedly failed to disclose a material fact. Justice Rehnquist wrote in his plurality opinion that:

> to obtain a new trial is such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id. at 556, 104 S.Ct. at 850.[24] The district court evaluated Montoya's juror bias claim under the *McDonough* standard, and Montoya makes no argument on appeal that the court improperly applied that standard to his claim.[25]

> This evidence cannot be gathered by any method short of a deposition.

Record on Appeal, vol. 2, at 397.

[24] Although the quoted language appears in a plurality opinion, we have treated the standard as the Court's holding. *See United States v. Ortiz*, 942 F.2d 903, 909 (5th Cir.1991) ("In *McDonough* . . . , the Supreme Court established a two-pronged test that governs this very situation. In the words of the Court. . . . ").

[25] Montoya specifically cited *McDonough* in his state habeas petition, and his federal habeas petition allegations and

We have applied the *McDonough* standard for a claim of juror bias based on failure to disclose a material fact in criminal cases on direct review. *See United States v. Scott*, 854 F.2d 697, 698-700 (5th Cir.1988) (holding that juror bias warranted new trial where juror knowingly concealed fact that his brother worked in prosecutor's office and parties did not dispute that juror "would have been challenged and excused for cause had he revealed that his brother was a deputy sheriff. . . . "); *United States v. Ortiz*, 942 F.2d 903, 909 (5th Cir.1991) (noting that juror's "familial ties to employees of law enforcement agencies may well not support a challenge for cause," but holding that juror "answered the voir dire query honestly yet inaccurately," as permitted under *McDonough*), *cert. denied*, 504 U.S. 985, 112 S.Ct. 2966, 119 L.Ed.2d 587 (1992); *see also United States v. Collins*, 972 F.2d 1385, 1403 (5th Cir.1992) (declining to apply *McDonough* framework for juror bias claim where alleged misstatement was of subjective belief rather than objective fact), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993). Our application of the *McDonough* standard to claims for juror bias on direct appeal from federal convictions does not necessarily mean that we apply an equivalent standard in a habeas case. *See Murphy v. Florida*, 421 U.S. 794, 797-98, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975) (distinguishing between constitutional standard for reversing conviction based on juror bias and standard applied in Court's exercise of federal supervisory power over federal criminal convictions). However, other circuits have applied

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response to the State's motion for summary judgment track the two prongs of the *McDonough* standard.

McDonough in the habeas context,[26] and we assume, arguendo, that a *McDonough* theory of juror bias would be sufficient to obtain federal habeas relief.[27]

Montoya's claim fails on the second prong of the *McDonough* standard because he has failed to establish that Juror X's correct response, that is, that she knew Kilheffer, would have constituted a valid basis for challenging Juror X for cause.[28] Although Montoya alleged in

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[26] *See, e.g., Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir.1991) (holding that juror's failure to disclose exposure to family and child abuse denied petitioner fair trial under *McDonough* because juror failed to answer question honestly and correct response would have provided basis for challenge for cause); *Tinsley v. Borg*, 895 F.2d 520, 524-26 (9th Cir.1990) (same), *cert. denied*, 498 U.S. 1091, 111 S.Ct. 974, 112 L.Ed.2d 1059 (1991); *Cannon v. Lockhart*, 850 F.2d 437, 440 (8th Cir.1988) (applying *McDonough* and finding no actual bias based on state court findings, which court held were entitled to presumption of correctness).

[27] We also assume, arguendo, that granting habeas relief on a *McDonough* theory of juror bias would not be barred by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[28] It is also questionable whether Montoya's allegations state a prima facie case with respect to the first prong of the *McDonough* standard, that is, whether Juror X "failed to answer honestly a material question on *voir dire*." *Id.* at 556, 104 S.Ct. at 850. The trial court asked the jury pool whether anyone knew "Mr. Kilheffer" from South Padre Island. No juror responded. The allegations in Juror Y's affidavit may suggest that Juror X realized during the trial that she knew Kilheffer, but they do not necessarily suggest that Juror X realized when she was asked that she knew Kilheffer. Thus, it is speculative whether Juror X (1) lied to get on the jury; or (2) honestly but mistakenly failed to realize she knew Kilheffer when asked. During her examination by counsel at voir dire on an unrelated issue, Juror X referred to

the district court that he could have challenged Juror X for cause had she answered correctly whether she knew Kilheffer, he cited no authority for this contention and makes no such argument on appeal. Challenges for cause in Texas criminal trials are governed by article 35.16 of the Texas Code of Criminal Procedure. *See Butler v. State*, 830 S.W.2d 125, 130 (Tex.Crim.App.1992) ("We hold that Article 35.16 is a complete list of challenges for cause.").[29]

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the victim as "this man from Padre Island" and not by name. Thus, Montoya's allegations with respect to the first prong may, to some degree, be speculative, and speculative allegations are insufficient to entitle a habeas petitioner to discovery and an evidentiary hearing. *East*, 55 F.3d at 1003.

[29] We have looked to state law as the nonexclusive basis to determine the grounds for challenges for cause because those were the grounds applicable to Montoya's trial. We have found no evidence that an independent federal constitutional standard would have provided a valid basis for challenging Juror X in these circumstances for cause over and above Texas law governing challenges for cause. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1035, 1037 n. 12, 104 S.Ct. 2885, 2891, 2891-92 n. 12, 81 L.Ed.2d 847 (1984) (noting federal constitutional standard for determining whether juror's ability to lay aside preformed opinion and render verdict based on evidence presented in court makes juror impartial, citing *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), but holding that state trial court determinations of impartiality are factual findings entitled to a presumption of correctness in federal habeas proceedings). For example, in *Jones v. Butler*, 864 F.2d 348 (5th Cir.1988), we addressed a habeas petitioner's claim that the state trial court had erroneously denied his challenge for cause to a juror who lived near the victim, knew her by sight, had visited the funeral home to view the body, etc. We noted that under Louisiana law, a juror could be challenged if the juror was "not impartial, whatever the cause of his partiality." *Id.* at 362. We held that the state trial court's implicit finding of impartiality in its denial of the

Article 35.16(c) contains two grounds on which a defendant may challenge a venireperson, neither of which applies to this case. Article 35.16(a) lists grounds that either the State or a defendant may assert. Among them, the only arguably applicable basis is the ninth: "That [the venireperson] has a bias or prejudice in favor of or against the defendant."

Consistent with the language of article 35.16(a)(9), the Texas courts have focused on a venireperson's bias in favor of or against the defendant rather than the victim. We have found no published opinion upholding a challenge for cause based on a venireperson's mere acquaintance with the victim of the crime for which the defendant has been charged, and the Texas Court of Criminal Appeals has squarely held that the mere fact that a juror knows the victim is not sufficient basis for disqualification. *See Anderson v. State*, 633 S.W.2d 851, 853 (Tex.Crim.App.1982). In *Anderson*, the juror was a school teacher at the school where the rape at issue occurred and knew the victim, who attended the school, and several of the State's witnesses, but did not know the defendant. The court stated: "Although such knowledge [of the victim] may be the source of an existing bias, 'the mere fact that a juror knows, or is a neighbor, or an intimate acquaintance of, and on friendly relations with, one of the

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petitioner's challenge for cause was entitled to a presumption of correctness under 28 U.S.C. § 2254(d) and therefore precluded federal habeas relief. *Id.*

parties to a suit, is not sufficient basis for disqualification.' " *Id.* at 853 (quoting *Allbright v. Smith*, 5 S.W.2d 970 (Tex.Comm.App.1928)).[30]

Because Montoya's allegations fail to establish a prima facie case under *McDonough*, the district court did not abuse its discretion in denying Montoya's request for discovery and an evidentiary hearing, *see East*, 55 F.3d at

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[30] *Accord Williams v. State*, 682 S.W.2d 538, 541-43 (Tex.Crim.App.1984) (holding that trial court properly rejected challenge for cause to juror who attended church with murder victim and victim's wife, knew of murder victim, and knew, although was not close friend with, victim's wife (citing *Anderson*)).

In *Jernigan v. State*, 661 S.W.2d 936 (Tex.Crim.App.1983), *cert. denied*, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 368 (1983), the Texas Court of Criminal Appeals affirmed a trial court's rejection of a challenge for cause to a venireman who knew the victim "all of his life" and admitted that he might have a "small amount of bias." The court upheld the trial court's ruling under *Anderson*, holding that "[i]n the instant case, as in *Anderson*, the alleged bias was based upon the veniremember's relationship with the victim, and no bias was directed toward appellant." *Id.* at 940. The court acknowledged that the personal relationship was closer than the relationships in *Anderson*. The court also stated, in *dicta*, that "it seems likely that the relationship might have affected [the veniremember's] ability to avoid bias against appellant in considering the questions on punishment once the jury had determined guilt," but noted that "the voir dire was directed entirely to the issue of the determination of guilt or innocence." The voir dire in this case was part of the court's initial questions to the jurors and related generally to the case. However, even if we took the court's dicta as more than just that, the relationship in *Jernigan* was closer than the acquaintance alleged in this case.

1003 (affirming denial of request for discovery and evidentiary hearing where petitioner's allegations that district attorney might have known about witness' mental illness were insufficient to support *Brady* claim).

D

Montoya contends next that the trial court, in its instructions to the jury during voir dire, diminished the jury's sense of responsibility for imposing the death penalty by misinforming it of its role in determining whether Montoya should receive the death penalty. In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 105 S.Ct. at 2639. In *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), the Supreme Court clarified its holding in *Caldwell* and held that to "establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Id.* at 407, 109 S.Ct. at 1215; *accord Sawyer v. Butler*, 881 F.2d 1273, 1285 (5th Cir.1989) (en banc), *aff'd*, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). In evaluating a *Caldwell* claim, we look to the "total trial scene," including jury selection, the guilt phase of the trial, and the sentencing hearing, examining both the court's instructions and counsel's arguments to the jury. *Id.* at 1286-87.

In this case, Montoya points to the trial court's instructions during voir dire, which he suggests minimized the jury's role.[31] The instructions he points to, however, accurately characterize the jury's role under Texas law. Under the Texas death penalty statute in effect at the time of Montoya's conviction, the jury answers the special issues "yes" or "no" and then the trial court imposes the punishment that follows from those answers:

> If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence

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[31] The court instructed the jury:

> [I]n the event that there's a finding of guilty, then a separate hearing has to be held to determine the punishment to be assessed in the case. And in other felony cases the jury may assess the punishment if the defendant elects to have the jury assess his punishment in the event he is found guilty.
>
> In capital murder cases the jury does not assess punishment. A hearing has to be held and the jury will be asked a couple of questions, and the burden of proof is on the State.
>
> [Reciting special issues.]
>
> Now, if you answer the two questions yes, then the Court, the judge, is required to assess the punishment of death to the accused.
>
> In the event you answer one or both questions no, then the punishment is life in prison, assessed again by the Court, and the jury does not assess the punishment but answers those questions. And then the Court is the one that assesses the punishment. I do, however, need to tell you the effect of your answers to those particular questions.

State Record, vol. IX, at 33-35.

> the defendant to confinement in the Texas Department of Corrections for life.

Tex.Code Crim.Proc.Ann. art. 37.071(e) (West 1981). Thus, the trial court did not misinform the jury of its role under local law and therefore did not violate *Caldwell*. *See Dugger*, 489 U.S. at 407, 109 S.Ct. at 1215; *Sawyer*, 881 F.2d at 1285.

In addition, the "total trial scene" contains ample communications to the jury of their responsibility for determining whether Montoya would receive the death penalty. For example, the prosecutor explicitly asked the potential jurors during voir dire if they understood that the jury's answers to the special issues would determine whether or not Montoya received the death penalty. Because the trial court accurately conveyed to the jury its role under Texas law in determining whether Montoya should receive the death penalty, and because the "total trial scene" leaves no doubt that the jury was not misinformed of its role, we hold that the district court properly rejected Montoya's *Caldwell* claim.

E

The remainder of Montoya's claims warrant little discussion. Montoya argues that the trial court violated his fifth, eighth, and fourteenth Amendment rights by introducing evidence of unadjudicated criminal conduct at the penalty phase of his trial. Montoya raises these issues to preserve them for future appeal to the Supreme Court, and as he concedes, they are foreclosed by circuit precedent. *See Duff-Smith v. Collins*, 973 F.2d 1175, 1184 (5th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1958, 123

L.Ed.2d 661 (1993); *Landry v. Lynaugh*, 844 F.2d 1117, 1121 (5th Cir.), *cert. denied*, 488 U.S. 900, 109 S.Ct. 248, 102 L.Ed.2d 236 (1988).

Montoya also argues that he was illegally detained without a prompt determination of probable cause, in violation of *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).[32] Not only is Montoya's claim unsupported by the record, but the Supreme Court clearly stated in *Gerstein* that in requiring a prompt determination of probable cause it did not mean to "retreat from the established rule that illegal arrest or detention does not void a subsequent conviction." *Id.* at 119, 95 S.Ct. at 865; *accord Lofton v. Whitley*, 905 F.2d 885, 889 (5th Cir.1990) ("Even if [the petitioner] were illegally detained, illegal 'detention does not void a subsequent conviction.' " (quoting *Gerstein*, 420 U.S. at 119, 95 S.Ct. at 865)). Consequently, Montoya's claim, even if it were supported by the record, would not entitle him to habeas relief.

IV

For the foregoing reasons, we AFFIRM in part, REVERSE in part, and REMAND with instructions to deny relief.

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[32] The Supreme Court held in *Gerstein* that the State "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Id.* at 125, 95 S.Ct. at 868-69 (footnotes omitted).

GARWOOD and JONES, Circuit Judges, specially concurring.

While concurring in Judge Garza's fine opinion in this case, we deem it appropriate to note an additional ground for rejecting petitioner Montoya's allegation that the federal district court erroneously denied him discovery and an evidentiary hearing on his claim that one of the jurors knew Montoya's victim. *See* Part IIIC of Judge Garza's opinion. Judge Garza holds that Montoya's petition in federal court did not sufficiently allege a prima facie violation of *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), to necessitate a federal factfinding endeavor.

We would also point out that Montoya alleged even less about this purported constitutional violation in his last-minute habeas petition filed in state court. In that venue, Montoya merely stated "on information and belief" that a juror knew the victim but did not disclose the fact in voir dire, and he sought time to conduct discovery thereon. He did not attach the affidavit of the other juror that he soon after filed in federal court, nor was there any allegation that the juror's acquaintance with Montoya was just discovered or was not discoverable sooner. He did not allege that the juror's familiarity with the victim was such that it would have biased her against Montoya.

Under these circumstances, Montoya did not allege sufficient facts to establish a prima facie *McDonough* violation in state court, and the state court properly denied relief on the ground that he failed to "reasonably show

the existence of any fact or facts which would be material to the issue of the legality of his incarceration."

Because Montoya failed to develop in state court the material facts surrounding this issue of juror disqualification, he was not entitled to a federal court evidentiary hearing unless he established cause and prejudice excusing the default. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11, 112 S.Ct. 1715, 1721, 118 L.Ed.2d 318 (1992). Montoya alleged in his federal petition neither of these preconditions to the granting of a federal evidentiary hearing. Consequently, we agree with the alternate holding of the district court that *Keeney* did not require it to conduct the initial factfinding proceeding. As the Supreme Court stated in *Keeney*, . . . "little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum." 504 U.S. at 10, 112 S.Ct. at 1720.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

IRINEO MONTOYA Petitioner, VS. JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE INSTITUTIONAL DIVISION, Respondent.	§ § § § § § § § § §	CIV. NO. B-92-145 (Filed Feb. 4, 1994)

STATEMENT OF THE CASE

A. Course of Proceedings Below

The state has lawful custody of Montoya on the basis of his conviction in the 107th District Court of Cameron County, Texas, in Cause No. 86-CR-68-A, styled *The State of Texas v. Irineo Montoya*. By an indictment filed on January 29, 1986, Montoya and a codefendant were charged in the 197th District Court of Cameron County, Texas, with capital murder in violation of Section 19.03 of the Texas Penal Code. On that same date, Montoya's case was transferred to the 107th District Court of Cameron County. Prior to trial, the court granted Montoya's motion to sever his trial from that of the codefendant.[1]

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[1] Following a jury trial in Cameron County in Cause No. 86-CR-68-A-1, the codefendant, Juan Villavicencio aka Juan Fernando Villavicencio, was acquitted on July 24, 1986.

On June 16, 1986, the jury found Montoya guilty of capital murder as charged in the indictment. After hearing additional evidence relating to punishment, the jury on June 16, 1986, affirmatively answered the two special issues submitted pursuant to Article 37.071 of the Texas Code of Criminal Procedure. Thereafter, in accordance with Texas procedure, the trial court imposed the death sentence.

Montoya's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals, which affirmed on May 24, 1989. *Montoya v. State*, 810 S.W.2d 160 (Tex. Crim. App. 1989.) Rehearing was denied on June 19, 1991. The United States Supreme Court denied certiorari review on November 13, 1991. *Montoya v. Texas*, ___ U.S. ___, 112 S.Ct. 426 (1991.)

On June 25, 1992, the state trial court issued a warrant ordering that Montoya be executed by lethal injection before sunrise on August 6, 1992. On August 3, 1992, the execution date was modified to September 17, 1992. Montoya filed a state writ of habeas corpus on September 15, 1992. The following day, the trial court entered findings of fact and conclusions of law and denied the state writ. Later the same day, the Texas Court of Criminal Appeals likewise denied the writ. *Ex parte Montoya*, No. 23,999-01 (Tex. Crim. App. Sept. 16, 1992.) Thereafter, on September 16, 1992, Montoya filed a petition for a stay of execution which was granted by this Court.

B. Statement of Facts

1. Guilt/Innocence Phase

On November 24, 1985, the body of John Kilheffer was found in a grapefruit grove in the Santa Rosalia area by the river east of Brownsville. R XVI 34-35, 159, 208, 214-17.[2] The body was in a moderately advanced stage of decomposition, which indicated that Kilheffer had been dead for approximately four to seven days. R XVI 71-72, 86-87, 90. Kilheffer's death was caused by stab wounds to the chest. R XVI 80. Kilheffer, who had been stabbed between twenty-two and twenty-five times, would not have died instantaneously. R XVI 72-74, 78, 83.

At approximately six o'clock in the evening on Sunday, November 17, 1985, Laura Lino saw a black and gray Blazer, which contained three people and had smoked glass windows, come out of Ringgold Park. R XVII 397-98, 411. When the vehicle stopped at a light, a man tried to get down from the passenger side of the vehicle, but someone pulled him back into the car. R XVII 401. At the next light, the person in the right front passenger seat again tried to open the door. R XVII 401. At this point, the person in the back seat pulled the front seat passenger into the back seat, and the person in the back seat went into the front. R XVII 404. The Blazer began to zigzag along the street, and Lino could see shadowed bodies struggling inside the vehicle. R XVII 404-05.

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[2] "R" refers to the state record of Montoya's trial, with the volume designated by Roman numeral and the page by Arabic number. "Tr" refers to the transcript of Montoya's trial. "SX" refers to the state's exhibits, by number of the exhibit.

As Lino followed the Blazer, the struggle continued. R XVII 405-06. Shortly before the Blazer turned off and Lino lost contact with it, the sun came through the tinted windows, and she saw an Anglo man in the back seat, about fifty years old, with blonde hair and gray beard. R XVII 406-07. When the man turned to look at her, his face was full of blood, and he wore an expression of desperation. R XVII 407. The person in the front passenger seat also turned and looked at Lino. R XVII 408. She described this person as a Mexican who looked unkempt and had a mustache; the driver also appeared to be Mexican. R XVII 413. Lino could not say, however, that she saw Montoya in the vehicle. R XVII 413, 536.

Later on the day of the murder, Marta Elena Gamez Mata ("Gamez") was visiting at the home of Juan Villavicencio, whom she knew as Fernando. R XVI 101-10. At dusk, Fernando came into the living room wearing bloody clothes. R XVI 110-12. Although Gamez did not see anyone with Fernando at the time, she heard his sister Gabi (Esparta Gabriela Villavicencio) talking with someone on the patio. R XVI 116; XVII 509, 513-14. When Fernando came into the house, he said they had just killed a person. R XVII 506-07. Fernando threw a bag of papers and a gun on the bed; among the papers was a Drivers License containing the photograph of an Anglo man with gray hair. R XVI 112-3. Gamez identified a photograph of John Kilheffer as appearing to be a picture of the same person whose picture was on the Drivers License. R XVI 113.

After Fernando had a bath,[3] he took Gamez and several members of his family dancing in Matamoros. R XVI 117-29, 187-93, 200-05. Montoya, whom Gamez had never seen before, went with them. R XVI 119-20; XVII 507, 513. Fernando was driving a Blazer, and Gamez, who was seated behind the driver's seat, got blood on her blouse. R XVI 122-23, 187; XVII 484. Subsequently, Gamez told her father about these events, and he called Crime Stoppers in Brownsville. R XVI 100, 211-12, 276-78; XVII 434-35.

Based on the information provided by Gamez, the police recovered the decedent's Bronco[4] in Matamoros. R XVI 213-21, 280-83. The vehicle contained apparent blood smears on the back of the driver's seat, on the front of the console, and on the arm rest and carpet; in addition, there was a pool of blood on the floorboard behind the driver's seat. R XVI 222-24, 282; XVII 355-56.

Using the information supplied by Gamez, the officers also obtained an arrest warrant for Juan Villavicencio and a search warrant for his residence, which were executed on December 2, 1985. R XVI 228-29, 283-84; XVII 430, 434. At this time, the police had a description but no name for the man who had been with Villavicencio. R XVI 229; XVII 501.

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[3] Isela Yolanda Villavicencio and San Juanita Garcia both testified that Montoya also took a bath at the house and changed his clothes. R XVI 185, 200; XVII 534.

[4] Although some of the witnesses had told the police that the vehicle was a Blazer, it was in fact a Bronco. R XVI 221.

Although Villavicencio was in fact in the house at the time of the search, the police did not at first realize that this was the case. R XVI 231-32. Officers therefore went to the nearby Texas Pool Hall to look for Villavicencio, where coincidentally they arrested Montoya for misdemeanor possession of marijuana. R XVI 231, 261-66, 270, 324-26. The officers subsequently learned that Montoya was the person who had been with Villavicencio at the time of the murder. R XVI 458, 479.

The following day, the officers obtained an arrest warrant for Montoya for the murder. R XVI 244. After Montoya had been warned of his rights in Spanish, he provided the police with a written statement about the murder. R XVI 243-55, 289-322; XVII 334-43.

Montoya told the police that on the morning of the murder, he and Villavicencio went to the Port of Brownsville, where they both worked as shrimpers, but the port was closed because it was Sunday. R XVI 313. They decided to hitchhike home, and an Anglo, who was about fifty years old with gray hair and a gray beard, gave them a ride in a black and gray Blazer. R XVI 313-14. After about ten minutes, the Anglo began rubbing Montoya's legs and crotch, and he asked the men in Spanish if they wanted to go to a motel room. R XVI 314, 319-20. Instead, they drove around Ringgold Park. R XVI 314.1

According to Montoya, as the men were driving in Ringgold Park, Villavicencio suggested to Montoya in Spanish that they rob the Anglo, but Montoya replied that he was afraid. R XVI 314-15. Villavicencio then told the Anglo to stop the car because he wanted to urinate. R XVI 315. When Villavicencio came back to the vehicle, he

opened the driver's door and started poking the Anglo with a knife, forcing the Anglo to jump into the back seat. R XVI 315. Montoya grabbed the Anglo by the neck, went into the back seat with him, and held the Anglo while Villavicencio continued to stab at the Anglo with the knife as he drove. R XVI 315. When the Anglo kept fighting, Montoya took out a unloaded gun and hit the Anglo with it. R XVI 315-16. Eventually, Villavicencio drove into a grapefruit grove in the levee area. R XVI 316. Montoya helped Villavicencio take the Anglo, who by this time was "all bloody," out of the vehicle and drag him to some trees where Villavicencio stabbed him while he was on the ground. R XVI 316.

Montoya said that "we" wanted to rob the Anglo, so they took a gold chain with a gold cross that was around the man's neck, a gold ring from one of his fingers, and a wallet containing about eighty dollars. R XVI 316. Afterward, they parked the Anglo's vehicle in an alley near Villavicencio's house, then went to the house to bathe and change clothes because they were both "all bloody." R XVI 316-16. Later, Villavicencio drove several members of his family and Montoya in the stolen vehicle to Matamoros where they went to a dance. R XVI 317-18. The next day, Villavicencio told Montoya that he had given the Anglo's ring and chain to a friend. R XVI 318. Montoya stated that Villavicencio did all of the stabbing and kept all of the proceeds of the robbery, with the exception of a denim jacket that Villavicencio gave to Montoya. R XVI 319-21.

Agustin Gonzalez, who was Fernando Villavicencio's brother-in-law, went to the dance in Matamoros with Montoya and other members of Villavicencio's family. R

XVII 380-90. When Gonzalez saw the Blazer, he realized that it was stolen. R XVII 384-85. During the day after the dance, Villavicencio told Gonzalez, in Montoya's presence, that a man had given them a ride and they had killed him with a knife. R XVII 391-94. Villavicencio said that he was driving the vehicle while Montoya got the man by the neck and pulled him back and stabbed him; afterward, they threw the body in a citrus grove. R XVII 393. While Villavicencio was telling this to Gonzalez, Montoya was making faces like he was laughing. R XVII 394.

Marta Gamez testified that on the night they went to Matamoros, Montoya looked different than he did at the time of trial in that his hair was longer and he had a little bit of a mustache. R XVII 421-22. Likewise, Isela Yolanda Villavicencio testified that at the time of the trial Montoya was pale, his hair was short, and he was well shaved, whereas when they went to Matamoros in November he was darker, he had more hair, and he had a little bit of a mustache. R XVI 186-87; XVII 423.

2. Punishment Phase

a. The State's Evidence.

During November of 1985, as Maria Hernandez was stopped at a red light in Brownsville, Montoya jumped into the back seat of her car, held a knife to her throat, and ordered her to drive to the beach. R XVIII 4-9, 12-13. When she started crying and screaming, Montoya told her that he would stab her if she was not quiet. R XVIII 6, 9. Near the beach, Montoya commanded Hernandez to

drive down a dirt road, then he ordered her to get out of the car and remove her clothes. R XVIII 9-10. Still brandishing the knife, Montoya put a towel on the ground, forced Hernandez to lie on it, and raped her. R XVIII 10-11. Although Montoya threatened to kill Hernandez, he returned her pants to her and drove away in her car. R XVIII 11, 15. Hernandez was positive that it was Montoya who raped her. R XVIII 14. Her car was recovered in Harlingen, Texas, after it was involved in an accident. R XVIII 44-45.

At around 8:00 p.m. on December 1, 1985, as Ayde Martinez entered the driver's seat of her car after attending church, Montoya got into the back seat. R XVIII 17-18, 20, 27-29. He put one hand around her shoulder and had a knife in the other hand. R XVIII 18. Montoya ordered Martinez to take him to Port Isabel, adding that he wanted to kill her, but he was reluctant to get blood on his hands. R XVIII 18. After driving for about fifteen minutes, Martinez was ordered by Montoya to turn into an isolated area where the car got stuck in the mud. R XVIII 19-20. When they were outside the car, Montoya put his jacket on the ground and pushed Martinez onto it, then he removed her clothes. R XVIII 21. Montoya got on top of Martinez and began kissing her and touching her breasts and vagina. R XVIII 22-23. He said he was going to rape her, and that he would kill her if they did not have sex, but he relented after she told him she was a virgin. R XVIII 22-24, 32. Montoya ordered Martinez, who was wearing only her blouse, to get into her car, then he got it out of the mud and drove a short distance before he ordered her out of the car and drove away. R XVIII 24. She subsequently reported the incident to the authorities,

and Brownsville police recovered her car, some of her keys, and her jewelry. R XVIII 24-27. Martinez' watch and ring were in Montoya's pocket when he was arrested. R XVIII 47-48, 50-53.

b. The defense evidence.

Manuel Gonzalez, who had known Montoya for two years, said Montoya did not know how to drive an automobile. R XVIII 55-57. Gonzalez characterized Montoya as a very calm person with good manners, whom he had never seen with a weapon, and whom he would not consider a threat to anyone. R XVIII 59. Gonzalez had never seen Montoya act in an obscene or forward manner towards Gonzalez' wife or anyone in the neighborhood. R XVIII 59-60.

Esperanza Gonzalez, the wife of Manuel Gonzalez, confirmed that Montoya was always respectful toward her and other people. R XVIII 61, 63-64. Montoya lived in their house as a renter for more than a year, during which time he played with her three small children, and she left them in his care. R XVIII 62-63. Despite the charges of which Montoya had been convicted, she would not be afraid to have him in her house again. R XVIII 63-64.

Araceli Picaso had known Montoya since 1984, when Montoya was fifteen or sixteen years old. R XVIII 65-66. While Montoya stayed with her and her husband, he played with her three small children, and she sometimes left them with him. R XVIII 67. He always acted respectfully toward her and well behaved. R XVIII 68. She had never seen him with a weapon, and she would not be

afraid to have him in her house if he were free. R XVIII 68.

Socorro Hernandez had known Montoya for three years through her husband, who captained a shrimp boat on which Montoya worked. R XVIII 70. Montoya had come to her house several times, especially when he was younger, and he was a friend to her three pre-teen-age sons. R XVIII 70-71. Montoya was honest and a good worker, and she had never seen him with a weapon. R XVIII 71. She also had never heard or seen him be disrespectful toward women. R XVIII 71. Despite the charges of which Montoya had been convicted, she would be willing to open her home to him again. R XVIII 71-72.

Montoya's father, who was a construction worker and stevedore, testified that Montoya was one of seven sons, none of whom had ever gotten into trouble. R XVIII 72-74. Montoya was a good boy while he lived with them in Tampico, Mexico, but he left home at the age of fifteen to find work in the United States. R XVIII 73-75. After he left home he returned to visit and brought money for the family. R XVIII 74.

OPINION

The Court will address the Petitioners claims according to merit, when not addressed by numerical designation and/or subject matter.

Claim Nine

In claim number nine the Petitioner maintains that the trial court improperly refused to accept the Jury's

statement that it was unable to reach an answer to either special issue and improperly coerced the jury into returning affirmative answers to both special issues in the sentencing phase. Specifically the petitioner complains of the Trial Judge's requests and supplemental charges during the sentencing phase.

The transcript indicates that the jury began deliberating on the special issues at 1 pm on June 17, 1986. At 2:40 pm a hearing was held outside the presence of the jury during which the trial court read the following two jury notes.

> *"We have not been able to reach a unanimous decision on yes or no"*
>
> *"We are awaiting further instructions. We are all definite in our decisions"*

The court then prepared the following response.

> *"Ladies and gentleman of the jury without telling me for what answer the jury has cast its votes, could you please indicate what the numerical vote is for each special issue?"* RXVIII 94; TR I 97F.

The Petitioner then objected to the Court's response urging that because the jury could not reach an answer he should be sentenced to life imprisonment in accordance with Art. 37.071(e) and further that any note given by the court at this time "could be considered by the jury as a comment by the court as to which way they should go". RXVIII 94. The court then received jury note number three indicating that the jurors were no longer deliberating and were awaiting further instructions. In response the court stated of record that the jurors had only been

deliberating for approximately one hour and forty minutes (RXVIII 95) and accordingly overruled all objections.

Thereafter Jury note number four indicated that the jury was split 9-3 and 10-2 on the special issues. The defense once again urged its objections to no avail, and at 2:45 the court sent the following response.

> *"Would you please deliberate for another thirty minutes to see if you are able to reach an answer to the special issues in accordance with the courts instructions and please report to me after that"* RXVIII 97-98.

At 3:41 pm, forty-two minutes after the courts "Allen" or supplemental charge, the jury reached a unanimous verdict in favor of death, i.e. affirmative responses were given to the special issues.

The Petitioner maintains that the trial court's inquiry as to the jury's numerical makeup and its supplemental charge were coercive. In *Brasfield v. United States*, 272 U.S. 448 (1926) the Supreme Court determined that judicial inquiry as to the "split" of a jury is reversible error. The court reasoned that such an inquiry is "never useful, generally harmful and not to be sanctioned" *Brasfield* at 450. Further, the court held there is no need for an objection or showing of harmful error when this occurs, it is a per se type of error. *Id.*

This per se rule is based on the Supreme Court's supervisory powers over the Federal Courts rather than constitutional considerations of Due Process. *Lowenfield v. Phelps*, 484 U.S. 231, at 240 fn.3. As a result circuit courts have not imposed the rule in its per se form in habeas corpus actions concerning state courts. *Williams v. Parke*,

741 F.2d 847, 851 (6th Cir. 1984); *Locks v. Sumner*, 703 F.2d 403, 405-407 (9th Cir. 1983); *Cornell v. Iowa* 628 F.2d 1044, 1047-48 (8th Cir. 1980), cert. denied, 449 U.S. 1126; *Ellis v. Reed*, 526 F.2d 1195 (4th Cir), cert. denied, 444 U.S. 973 (1979). Rather, federal courts are to look to the totality of the circumstances when determining whether or not a state court's actions and supplemental charges did or did not have a coercive effect upon the jury. *Lowenfield; United States v. Lindell*, 881 F.2d 1313, 1321-1322 (5th Cir. 1989). The court is to proceed upon a case by case basis. *Lindell*, citing *United States v. Fossler*, 597 F.2d 478, 485 (5th Cir. 1979). However, there are some factors that the Fifth Circuit has considered in the past. 1). Were there any jury notes indicating that the jury was still deadlocked after the supplemental charge was given. 2). Was the verdict a discriminating one[5], i.e. how much time did the jury deliberate. 3). Did the trial judge inquire as to the numerical division of the jury. 4). Was there a deadline set as to how much more time the jury should deliberate. *See, United States v. Lindell.*

Other circuits consider the relationship of the factors to each other. For example, in *Cornell v. Iowa*, 628 F.2d 1044, 1048 fn 2. (8th Cir. 1980), cert. denied, 449 U.S. 1126 (1981), the eighth circuit noted that the coercive impact of even a modest "Allen" charge is heightened when proceeded by an inquiry as to the jury's numerical division. The court reasoned that when an "Allen" charge is preceded by an inquiry as to the jury's numerical division the jury is very likely to perceive that the revelation of their division prompted the verdict urging instruction

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[5] *United States v. Foster*, 711 f.2d 871, 884 (9th Cir. 1983).

and, that it was therefore directed towards the minority jurors. *See, Cornell.* The result is a coercive influence upon the minority jurors.

At Irineo Montoya's trial the trial judge received several notes from the jury indicating that they were deadlocked as to the special issues. While these alone do not constitute reversible error[6] they are factors to be considered in the totality of the circumstances. Secondly, the trial judge inquired into the numerical division of the jury. RVIII 94, TRI 97 F. This inquiry was followed almost immediately by a supplemental charge asking the jury to deliberate further. RXVIII 97-98. As a result the minority jurors likely perceived that this charge was prompted by the revelations of their numerical split to the trial judge. Further the trial judge in jury note number four gave the jury what could easily be considered a time limit to their deliberations, *"would you please deliberate for another thirty minutes to see if you are able to reach an answer to the special issues in accordance with the court's instructions and please report to me after that"* RXVIII 97-98. Lastly the verdict was returned within forty two minutes of the court's supplemental charge, indicating that the verdict may not have been a "discriminating verdict" as contemplated in *United States v. Foster.*

The Court has considered all of the factors enumerated in *Lindell.* At the very least three out of the four factors found in *Lindell* were present in Irineo Montoya's

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[6] *Allen v. United States,* 164 U.S. 492, 17 S. Ct. 154, (1896).

case.[7] When all of these factors are considered the totality of the circumstances indicate that the minority jurors were sufficiently coerced and influenced by the trial courts actions, jury notes and supplemental charges as to render the trial jury's decision invalid at the sentencing phase. Therefore it is the Opinion of this Court that Habeas Relief as sought pursuant to petitioners claim number nine should therefore be hereby granted and that probable cause should issue.

CLAIM 24

The petitioner asserts here that the jury was instructed regarding an offense which he was not charged with in his indictment. This purportedly resulted in a violation of his right to notice of the nature and charge of the offense he is accused of in violation of the Sixth and Fourteenth Amendments. Specifically, Montoya maintains that the trial court's instructions regarding responsibility for the criminal conduct of another, i.e. aiding and abetting, included an instruction on conspiracy which is a separate offense under the Texas Penal Code. The alleged result of this instruction was a conviction for an offense not charged in the indictment which violated his constitutional rights.

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[7] The first factor, the jury's deadlock notes, while present, were not issued after the trial judge's "Allen" charge and therefore may not be an indicator of coercion as contemplated in *Lindell*.

Mr. Montoya's indictment charged him with:

> "unlawfully, intentionally and knowingly caus[ing] the death of John E. Kilheffer, the deceased, by stabbing the deceased with a knife, which then and there in the manner of its use or intended use was capable of causing serious bodily injury or death, and the said defendant [was] then and there in the course of committing and attempting to commit the offense of robbery of John E. Kilheffer. . . . "

This was the only offense charged in the indictment, however the State has the authority to make the aider and abettor equally responsible and this does not have to be charged in the indictment.[8] Accordingly the trial court's charge in Montoya's case tracked the Texas Penal Code's language regarding responsibility for the criminal conduct of another, V.T.C.A., Penal Code § 7.02. However, the trial court also charged for culpability for the actions of a co-conspirator, § 7.02(b)[9]. The court also gave a definition as to the nature of a conspiracy. The Court's charge in this regard was as follows:

> *"If in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, then all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of*

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[8] *See, Generally Lockett v. Ohio*, 438 U.S. 586, (1978); *United States v. Martin*, 747 F.2d 1404, (11th Cir. 1984); *Rico v. State*, 707 S.W.2d 549 (Tex. Crim. App. 1983).

[9] Actually the charge was a mixture including both V.T.C.A. Penal Code § 7.02(a) and § 7.02(b).

the carrying out of the conspiracy. Capital murder, murder, robbery, and attempted robbery are all felonies. V.T.C.A., Penal Code § 7.02(b)

By the term "conspiracy" as used in these instructions, is meant an agreement between two or more persons, with the intent that a felony be committed, that they, or one or more of them, engage in conduct that would constitute the offense. An agreement constituting a conspiracy may be inferred from acts of the parties.

Now, if you find from the evidence beyond a reasonable doubt that Irineo Montoya aka 'El Ney' and Juan Villavicencio. . . . entered into an agreement to commit the offense robbery, as above defined, of John E. Kilheffer, and pursuant to that agreement, they did carry out their conspiracy and that on or about the 17th day of November, 1985, in Cameron County, Texas, while in the course of committing such robbery, Juan Villavicencio . . . intentionally caused the death of John E. Kilheffer, by stabbing him with a knife with the specific intent to kill him, and that the defendant Irineo Montoya pursuant to the conspiracy, if any, with the intent to promote and assist Juan Villavicencio . . . in the execution of the robbery of John E. Kilheffer, if any, and that the stabbing of John E. Kilhefer was committed in furtherance of the conspiracy, if any, of Irineo Montoya, and Juan Villavicencio to rob John E. Kilheffer, and that the stabbing of John E. Kilheffer, if any, was an offense that should have been anticipated as a result of the carrying out of the conspiracy, then you will find the defendant guilty of capital murder. Emp. added to portions of V.T.C.A., Penal Code § 7.02 (a)(2).

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder."

The Respondent points to a line of cases that all deal with similar issues regarding V.T.C.A., Penal Code § 7.02. These cases conclude that there is no constitutional error in using a V.T.C.A., Penal Code § 7.02 (b) instruction when conspiracy is not charged in the indictment. *English v. State,* 592 S.W.2d 949, 955 (Tex. Crim. App.), *cert. denied,* 449 U.S. 891 (1980); *Nix v. State,* 750 S.W.2d 348, 354 (Tex. App. – Beaumont 1988); *Flores v. State,* 681 S.W.2d 94, (Tex. App. – Houston [14th dist] 1984). The Texas courts rationalize that in the context of "aiding and abetting" the conspiracy language found in § 7.02(b) is simply an alternative basis for making a person criminally responsible for an offense actually committed by the conduct of another. *Id.* Therefore, the law of conspiracy that the jury is instructed on in § 7.02(b) does not relate to a substantive offense of "conspiracy" but rather is only "incidentally defined therein". *Flores* at 97. The respondent contends that in light of this Texas jurisprudence there was no constitutional error. This Court disagrees.

Basic constitutional jurisprudence provides that a conviction for a separate offense not named in the indictment violates the Sixth Amendment right to notice and nature of the accusation and the Fourteenth Amendment right to Due process of law. *See e.g., Dunn v. United States,* 442 U.S. 100 (1979) (*"to uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process"*); *Shepard v. Rees,* 883 F.2d 795 (9th Cir. 1989); *Givens v. Housewright,*

786 F.2d 1378 (9th Cir. 1986). The Texas penal code provides that conspiracy is a separate offense which carries a separate punishment and may require a separate defense from that of aiding and abetting. *See,* V.T.A.C. Penal Code § 15.02. Despite the opinion set forth by the Texas Courts it appears obvious that § 7.02 (b) was intended only to apply in instances where the State is seeking to hold the defendant responsible for the criminal acts of another committed in the course of a conspiracy. If conspiracy was not alleged in the indictment a simple instruction from § 7.02 (a) would suffice to hold a person criminally responsible for the conduct of another under a theory of aiding and abetting.

In Montoya's case the trial court included an instruction to the jury on the criminal responsibility aspects of conspiracy found in § 7.02 (b) and then followed this instruction with a definition of conspiracy. However, conspiracy was not charged in the indictment and no notice of conspiracy was given to the defendant. This in effect provided the possibility that the defendant was convicted of an offense, conspiracy and the related criminal responsibility provisions, which was not charged in the indictment. *See, Dunn.* This violated Mr. Montoya's right to notice of the nature and charge of the offense he is accused of in violation of the Sixth and Fourteenth Amendments.

The effect of the trial court's mix of instructions from § 7.02 (a) and § 7.02 (b) in Montoya's case was to lower the required culpable mental state required for a capital offense under his indictment without giving him notice

prior to the court's charge[10]. Once the jury was instructed on conspiracy and its related criminal responsibility repercussions the jury was able to convict the petitioner for the acts and motives of the co-defendant without finding the intent required in aiding and abetting.[11] This allowed the jury to convict the defendant with a lower standard of mental state than his indictment charged and eventually receive the death penalty.

Further, the separate offense of conspiracy is limited to one category lower than the most serious felony that is the object of the conspiracy. V.T.C.A. § 15.02 (d). Therefore the separate offense of conspiracy *alone* could not result in the death penalty. When conspiracy is properly alleged in the indictment co-conspirators could in fact be liable for the capital crimes of their co-conspirators and thus receive the death penalty without the finding of intent. In those instances the Constitution requires that they be given notice pursuant to the Sixth and Fourteenth Amendments. In Montoya's case no such notice was given. The effect was to allow a conviction for capital

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[10] If the jury believed that his co-defendant actually murdered the victim, Montoya's indictment necessarily provided he could only be convicted of capital murder under a theory of aiding and abetting, it did not allege anything else. Aiding and abetting is a criminal theory that requires a showing of specific mental intent.

[11] Co-conspirators may be held liable for the acts of the other co-conspirators, even though they had no intent to commit the offense, so long as they meet the requirements for conspiracy. V.T.C.A. § 7.02 (b).

murder at a lessor level of mental state than the indictment required.[12]

The combination of allowing the jury to consider an offense not charged in the indictment and the resulting "lowering of required mental state" caused the petitioner to be deprived of his Sixth and Fourteenth Amendments rights[13]. As a result Habeas relief is granted pursuant to claim twenty-four and probable cause is hereby issued.

CLAIMS 1 & 2

Montoya's death sentence was imposed based upon the jury's affirmative responses to the two statutory punishment phase issues allowed by Texas law. TEX. CODE CRIM. PROC. ANN. art. 37.071 (b). In the Petitioner's first two claims he contends that these special issues employed at the punishment phase of a Texas Capital murder trial are unconstitutionally vague. Specifically, he objects to a lack of definition of the terms "deliberately,"

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[12] For another look at this argument see Justice Clinton's dissent in *English v. State*.

[13] Since this matter was determined this Court has been favored with the Fifth Circuit's opinion on *McKay v. Collins*, Slip Op. 92-1283; *Williams v. Collins*, Slip Op. 92-8567, (5th Cir. 1994). This Court finds this case Distinguishable in that the indictment in Montoya's case failed to allege an entire offense, conspiracy, rather than missing "essential terms." *McKay v. Collins*, Slip Op. 92-1283; *Williams v. Collins*, Slip Op. 92-8567, (5th Cir. 1994).

"probability," "criminal acts of violence," and "continuing threat to society."[14]

To pass constitutional muster, a death penalty scheme must "genuinely narrow the class of persons eligible for the death penalty and. . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 2742 (1983). Further, the factor that is used to perform this constitutionally mandated narrowing function may not be constitutionally vague or it will be in violation of the Eight [sic] Amendment. *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759 (1980).

In Texas the special issues are not necessary to perform any constitutionally mandated narrowing function, and because the issues do not serve as aggravating factors that are weighed against mitigating factors the Petitioner's claim does not implicate the Constitution. Under the Texas scheme the narrowing function mandated by the Constitution is performed by the penal statute defining the offense of capital murder rather than aggravating factors at the sentencing phase. *Jurek v. Texas,* 428 U.S. 262, 268-71(1976); *LowenField v. Phelps,* infra. In other words, the definition of capital murder encompasses aggravating elements that distinguish capital murder from simple murder. *Id.* When constitutionally required narrowing is performed at the guilt/innocence phase, a

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[14] At trial the petitioner neither asked that definitions for these terms be included nor did he object to the submission of the charge without definitions for these terms.

death sentence may not be invalidated based on allegations that further narrowing does not occur at the sentencing phase. *LowenField v. Phelps,* infra.

Additionally, the law of the Fifth Circuit compels rejection of Montoya's claims. The undefined terms in the special issues have "a plain meaning of sufficient content that the discretion left to the jury. . . . [i]s no more than that inherent in the jury system itself" *Thompson v. Lynaugh,* 821 F.2d 1054, 1060 (5th Cir.) cert. denied, stay denied, 483 U.S. 1035 (1987). The Supreme Court has also stated that the undefined terms in the punishment issues contain a "common sense core of meaning" that jurors are capable of understanding. *Pulley v. Harris,* 465 U.S. 262 (1976). The Texas special issues are not necessary to perform the constitutionally mandated narrowing, and the plain meaning of the terms therein are not constitutionally vague. Therefore Habeas relief is DENIED in grounds one and two.

CLAIM 3

In claim three Montoya argues that the Texas death penalty statute deprived him of his Eighth amendment right to an individualized sentencing determination because the jury was precluded from giving full consideration to his mitigating evidence. Specifically he asserts that the jury had no vehicle under the Texas statute to consider and give mitigating effect to his evidence of youth, lack of supervision as a teenager, intoxication at the time of the offence, and positive character traits. This claim is based on *Penry v. Lynaugh,* 492 U.S. 302 (1989) wherein the Supreme Court held that a death sentence

imposed by a sentencer who was precluded from giving full effect to mitigating evidence violates the Eighth Amendment. *See also, Lockett v. Ohio,* 438 U.S. 586 (1978).

The applicability of the rule in *Penry* is limited to a restricted set of circumstances in which the major mitigating thrust of evidence exceeds the scope of the special issues, and as a result the mitigating relevance the evidence may have had to the special issues is too small to overcome the aggravating potential that same evidence posses [sic]. The rule in *Penry* does not invalidate the Texas scheme in instances where no major mitigating thrust of the evidence is substantially beyond the scope of the special issues. *Gram v. Collins* 960 F.2d 1009 (5th Cir. 1992) (*en banc*); *accord Gram v. Collins,* 113 S.Ct. 892 (1993), *see also, Jurek v. Texas,* infra. In other words, there must be a *Penry* like situation before a special instruction is warranted, and absent that situation the Texas scheme satisfies concerns of Eight Amendment protection by allowing mitigating evidence to be considered by the jury.[15] *Id.*

The Petitioner maintains that his mitigating evidence of youth, lack of supervision as a teenager, intoxication at the time of the offence, and positive character traits all constitute Penry like situations and therefore the jury

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[15] In *Penry* the fact that the Defendant was mentally retarded was both mitigating and aggravating at the same time. It mitigated special issue #1, he did not fully comprehend his conduct, but it aggravated special issue #2 because he could not learn from his mistakes and therefore was a continuing threat to society. This constituted a situation where the mitigating thrust was beyond the scope of the special issue.

could not consider the mitigating effect. This court disagrees. Montoya's evidence of youth is a factor that the sentencer may view as mitigating and therefore not also aggravating as in *Penry*. *Graham v. Collins* at 925. Montoya's upbringing also does not fit into the *Penry* category because the jury was able to consider it as a mitigating factor under the special issues.

The petitioner also contends that the jury could not consider his intoxication. The record does not reflect that Montoya was intoxicated other than the fact he shared a single marijuana cigarette some time prior to the offense, but there is no evidence in the record that the petitioner was actually intoxicated at the time of the offense. Nothing in the Constitution requires the state courts to give mitigating instructions concerning circumstances that there is no evidence to support. *Delo v. Lashely*, 113 S.Ct. 1222, 1225 (1993). Nonetheless, if Montoya's drug usage reduced his culpability for the offense, that opinion could be fully reflected in the jury's response to the first special issue. *Barnard v. Collins*, 958 F.2d 634 (5th Cir. 1992).

Lastly, Montoya argues that his jury was precluded by the special issues from giving proper independent mitigating effect to evidence of his positive character traits and his cooperation with authorities. Evidence of good character prior to the capital offense is relevant to sentencing because it demonstrates that the conduct was an "aberration from otherwise good character". *Boyde v. California*, 470 U.S. 370 (1990). Such evidence is covered by the second punishment issue because it "tends to indicate that the crime in question is not truly representative of what the defendants normal behavior is or may

become over time, and that the defendant may be rehabilitated so as to not be a continuing threat to society." *Graham* at 1029. Indeed, in *Graham* even the dissenters rejected the assertion that the jury could not give adequate consideration to the mitigating effect of positive character under the Texas special issues. *Graham*.

Additionally, application of *Penry* to these claims would constitute a "new rule" as contemplated in *Teague v. Lane*, 489 U.S. 288 (1989), and as a result is not available to a habeas petitioner. Therefore habeas relief is denied.

CLAIM 4

Montoya's fourth claim asserts that his rights under the Eighth and Fourteenth Amendments were violated because the trial court's instructions inaccurately informed the jury of the death sentencing process and their role in it. This claim stems from *Caldwell v. Mississippi*, 472 U.S. 320, (1985), wherein the Supreme Court held that "[i]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rest elsewhere." *Caldwell* at 328-329.

This Court does not agree with the petitioner's contentions. The record reflects that both the jury panel and the actual jurors were fully informed, that via their answers, they would be responsible for imposing the death penalty. In Voir Dire each juror stated they understood. *RIX 90-93 (Javier Torres); RXI 186 (Diana Banda; RIX 264-65 (Josephine Lucio); RX 484-85 (William Howell); RXI 831 (Angel Donez); RXI 840 (Pablo Muniz); RXII 950-52*

(Maggie Aguilar); RXII 1114-15 (Beltran Villagran); RXIII 1263-64 (Norma Gonzales); RXIII 1309 (Jose Hernandez); RXIII 1344 (Judy Parish); RXIII 1400-01 (Patricia Loomis). In closing arguments they were once again reminded by both the defense and prosecution. RXVIII 80, 84, 89. Therefore Claim four is Denied.

CLAIM 5

In claim five the petitioner maintains that the trial court failed to inform the jury that if they did not answer either of the special issues a life sentence would be imposed, thereby precluding individual jurors from electing this response. The Texas capital sentencing statute provides that the court shall charge the jurors that they may not answer any of the punishment phase issues "yes" unless they agree unanimously, and that they may not answer any issue "no" unless ten or more jurors agree. *Tex. Code Crim. Proc. Ann. art. 37.071 (d)(1) & (2).* In Montoya's case the trial court charged the jury according to art 37.071. TRI 94-95

While the sentencing statute requires a life sentence to be assessed when jurors are unable to agree on a response to a submitted issue, it specifically prohibits the Court or the attorneys from informing the jury of the effect of the failure to agree. *Art.37.071 (e) & (g).* A defendant has no right to an incomplete verdict under Texas law, Tex. Crim. Proc. Ann. art. 37.07 (3)(c), and no right to have the jury instructed that it can fail to render a verdict. *Ex parte Bailey,* 626 S.W.2d 741, 742 (Tex. Crim. App. 1981). In this claim Montoya seeks the application of a new rule of criminal procedure that cannot be

announced or applied on federal habeas review. *See, Cordova v. Collins* 953 F.2d 167 (5th Cir.), *cert. denied,* 112 S.Ct. 959 (1992). Thus, even if there was an identified constitutional error in this claim, it would be foreclosed under the principle of *Teague v. Lane,* 489 U.S. 288 (1989).

The Supreme Court has made it clear that, while a state may not, consistently within the Eighth Amendment, bar presentation and consideration of relevant mitigating evidence at the sentencing phase, it can establish rules that control how the jury considers and weighs this evidence at the sentencing phase. This is in fact what Tex. Code Crim. Proc. Ann. art. 37.071 (d)(1) & (2) does; it controls how the jury considers and weighs this evidence at the sentencing phase. Therefore it does not violate the Eighth Amendment. *Saffle v. Parks,* 494 U.S. at 490; *Walton v. Arizona,* 110 S.Ct. 3047 3056 (1990). Habeas Relief on this ground is Denied.

CLAIM 6

In claim six Montoya contends that the court's charge failed to adequately instruct the jury to consider mitigating evidence in determining the appropriate punishment because "the judge never informed the jurors they were required by law to consider mitigating evidence presented in the case. . . . " and therefore violated the Eighth and Fourteenth Amendments. Specifically he complains of the following charge:

> "You are further instructed that in determining each of the special issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is all of the

> evidence submitted to you in the first part of this case wherein you were called to determine the guilt or innocence of the defendant, and all of the evidence admitted before you in the second part of the trial wherein you are called upon to determine the answers to the special issues." Vol. I at 95

This claim is patently without merit. The Fifth Circuit has clearly stated that the Constitution does not require the use of the words "mitigating circumstances", but rather that the jury is told to consider all the evidence. *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1981). The Constitution is satisfied "[so] long as the instruction clearly communicates that the law recognizes the existence of circumstances which do not excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability or punisment" *Id.* The Court could not have stated in more clear or precise language that the jury could consider all of the evidence presented at both phases of trial, which necessarily included any mitigating evidence offered by Montoya. Therefore this claim is denied.

CLAIM 7

The next claim alleges that Montoya was unconstitutionally deprived of his Eighth Amendment right to an individualized sentencing determination because the court's instruction to the jury not to consider or discuss

pardon or parole precluded the jury from giving full consideration to relevant and mitigating law.[16]

The Fifth Circuit has rejected the contention that the refusal to instruct a jury on the law of parole amounts to a violation of the United States Constitution. *Andrade v. McCotter,* 805 F.2d 1190 (5th Cir. 1986); *O'Bryan v. Estelle,* 714 F.2d 365 (5th Cir. 1983), *cert. denied,* 465 U.S. 1013 (1984). Therefore Montoya has not demonstrated that he has been deprived of any constitutional right in this claim. At the most he has presented an issue of state law that is not cognizable in federal habeas proceedings. *See Wainwright v. Goode,* 464 U.S. 78 (1983). Habeas pursuant to claim seven is denied.

CLAIM 8

Claim eight is predicated upon the assertion that both the special issues and the failure of the trial court to instruct the jury that the law of the parties and the law of conspiracy do not apply in the punishment phase precluded the jury from considering or giving effect to the mitigating evidence that Mr. Montoya did not directly kill the deceased. In other words he complains of the trial court's failure to instruct the jury that the law of the parties did not apply at the sentencing phase.[17]

The Fifth Circuit has rejected this precise claim, namely, that a jury, in responding to the special issues, "was unable to consider and give mitigating effect to his

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[16] Montoya did not ask at trial to have his jury instructed with respect to these issues.

[17] Montoya never requested such an instruction at trial.

self-described non-trigger man role in offense." *Stewart v. Collins*, 978 F.2d 199 (5th Cir. (1992). The Court concluded

> "[T]he first special issue clearly encompasses any evidence that he was merely an accomplice in the killing and lacked the intent to kill. The first special issue inquires solely into the defendant's conduct. The law of the parties is not even applied to the punishment deliberations."

The law in this regard was reaffirmed in *Harris v. Collins*, No. 92-2918, slip op. at 6-10 (5th Cir. April 22, 1993). Additionally, it is obvious from the language of the first special issue that the jury must focus on the defendant's individual and personal culpability for the crime, rather than that of his accomplice, before an affirmative response may be returned. *See*, Tex. Code Crim. Proc. Ann. Art. 37.071 et seq.

For the reasons stated herein and above the petitioners habeas relief pursuant to claim eight is hereby denied.

CLAIM 10 & 11

In these two claims the Petitioner contends that the States' *"deliberate and bad faith"* destruction of the victim's thumb and forefingers, which were used for identification when the body was discovered, and the states subsequent delay in producing photographs and reports pertaining to the fingers denied him due process under the Fifth and Fourteenth Amendments.

The record indicates that after the body of the victim was discovered the fingers were removed and sent to a

department of Public Safety Lab for identification purposes. RXVI 52-53, 147. These fingers were then photographed rather than printed because of their decomposed condition. RXVI 156-57. Once the fingers were identified the lab then followed procedures by seeking and receiving permission to destroy the fingers "because of the condition of the fingers"[18]. RXVI 53, 160. Defense counsel objected to the admission of the testimony concerning the fingers because he had not had his own expert examine the fingers. RXVI 133-34. He also objected that he had not seen the photos of the fingers or the finger print card until the trial itself, however the record indicates that the defense counsel admitted to seeing these items the preceding week. RXVI 95-96, 134. Defense counsel also requested a continuance to have an expert examine the fingers. RXVI 135, 139. The court denied these objections noting that discovery had been ongoing for some time and that if there had been a problem the court should have been notified earlier. RXVI 135

In order to prevail on a claim that failure to preserve potentially useful evidence denied the defendant due process of law, the defendant must demonstrate several prerequisites. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). The police must be shown to have acted in bad faith, the exculpatory value of the evidence must be apparent, and it must be apparent before the evidence was destroyed. *Youngblood* at 56, quoting *California v. Trombetta*, 467 U.S.

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[18] Detective Olsson provided the authorization to destroy the fingers. RXVI 53.

479, 489 (1984). Moreover, mere negligence in the preservation of evidence does not establish a constitutional violation. *Youngblood.*

The Court agrees with the Respondent's contention that the victim's fingers were not destroyed in bad faith and in the face of apparent exculpatory value. The record indicates that the fingers were in a advanced stage of decomposition and were not ordinary evidence in the sense that they would require special storage and maintenance. Further, it was routine practice for the lab to either send body parts back to the police or destroy them. Additionally the record is rife with other evidence that indicates that the body of the victim was in fact John Kilheffer.[19]

Also, the photograph of the victim's thumb was made available to the defense at trial and was in fact introduced at trial. RXVI 53, 157-58; SX 67. Nothing prevented the defendant from having his own expert examine the photograph and question the identity of the defendant. Therefore no crucial evidence was withheld from the defendant at his trial. This Court is not convinced that any favorable evidence was suppressed by the state in this case and further, if any information was delayed it was not material in the sense that the proceedings would have had a different outcome as a result. *See, Brady v. Maryland,* 373 U.S. 83 (1963). For the reasons

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[19] For Example, the record indicates that the deceased's car was located in Mexico and his identification was seen along with the rest of his belongings at the co-defendant's house all of which was corroborated by trial testimony.

herein and above the Petitioner's claims for habeas relief pursuant to claim ten and eleven are hereby denied.

CLAIM 12 & 22

In these claims Montoya asserts respectively that his confession was improperly admitted over objection because it was involuntary, was the product of coercion, and that the authorities failed to administer him "Miranda warnings" prior to his confession. All of these allegedly violated the due process provisions of the Fifth and Fourteenth Amendments.

The final determination of the voluntariness of a confession is a matter of independent federal review, however, "great weight" is to be given to the "considered conclusions of the coequal state judiciary" *Miller v. Fenton*, 474 U.S. 104 (1985). The trial court in Montoya's case held an extensive pre-trial hearing to determine the admissibility of his confession and determined that his motion to suppress should be denied and a written order was entered to that effect. RXV 135, Tr. I 80-81. Nevertheless, this Court has conducted an extensive review of the trial transcripts concerning the motion to suppress[20] and determined that Montoya's statement was given voluntarily, after a knowing and intelligent waiver of his constitutional rights and accordingly properly admitted by the trial court.

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[20] The record contains numerous direct inconsistencies between the defendants accounts of events and those of both the officers and other eyewitnesses.

In a related claim, twenty-two, Montoya asserts that his confession was improperly admitted because he was not properly warned of his Miranda rights prior to his confession. *See, Miranda v. Arizona,* 384 U.S. 436 (1966). The record of Montoya's trial contradicts any such assertion. Montoya was warned of his rights at least once on the night of his arrest, RXV 32[21], and warned again at least three times in Spanish[22] the following morning prior to his handwritten confession. RXV 37-38, 42, 77-78, XVI 289-94. He was also warned yet another time prior to his signing the typewritten statement. R 40-41, 88886 [sic]; XVI 298.

In light of the forgoing considerations and overwhelming evidence in support of the trial courts determination, it is the Opinion of the Court that the Habeas relief pursuant to claims twelve and twenty-two will be denied.

CLAIM 13

The next claim concerns Montoya's contention that the prosecutor engaged in misconduct, specifically impermissible references to the defendant's failure to testify, which resulted in a violation of the defendant's Fifth and

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[21] Montoya argues that he was drunk on the night of his arrest, however the record indicates that the police did not question him until the next day, at which time he was re-mirandized several times.

[22] The record reflects that Spanish is Montoya's native language and that both officers who warned Montoya use the language on a routine basis.

Fourteenth Amendment rights to remain silent. Montoya points to the following remarks:

> "Remember what Agustin said? that 'El Ney'[23] was standing there laughing. He had a strange kind of laugh. Is that a man that wouldn't know anything about this."
>
> "So picture "El Piolin"[24] driving and he's trying to stab John Edgar Kilheffer. This is a man who wouldn't lay there when he was being stabbed but "El Ney" says "Piolin" is driving and "El Ney" is stabbing him."

He asserts that these remarks "imply" that the defendant failed to rebut witness' testimony by failing to testify[25].

In order for constitutional error to have occurred, and for a reversal to be mandated, a prosecutor's improper arguments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process" *Darden v. Wainwright,* 477 U.S. 168 (1986); *quoting Donelly v. DeChristoforo,* 416 U.S. 637 (1974). The analysis to be applied is whether the statement was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. *Rogers v. Lynaugh,* 848 F.2d 606 (5th Cir. 1988). If under this test the statements amount to constitutional error, then the court must inquire as to whether or not the error was harmless, i.e. did it change the result of the trial. *United States v. Parker,* 877 F.2d 327 (5th Cir.), cert. denied, 493 U.S. 871 (1989).

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[23] This was the defendant's nickname.

[24] This was the co-defendant's nickname.

[25] Montoya made no objection at trial.

The Fifth Circuit has also noted that the lack of an objection at trial "supports the common-sense interpretation that the reference would not naturally and necessarily" be taken to be a comment on a defendant's failure to testify. *Milton v. Procunier,* 744 F.2d 1091 (5th Cir. 1984), cert. denied, 471 U.S. 1030, (1985).

After careful consideration of the prosecutor's comments and the context in which they were made it is the opinion of the Court that these statements did not so infect the trial with unfairness as to make the resulting convictions a denial of due process. Further it is apparent that these statements were not intended to be of such a character that a jury would naturally and necessarily take it to be a comment on the failure of Montoya to testify. Therefore habeas relief pursuant to claim thirteen will be denied.

CLAIMS 14, 15 & 16

In three related claims Montoya complains of the admission of evidence of prior unadjudicated acts at the punishment phase of his trial. Specifically he avers that the admission of the evidence in the punishment phase violated both his right to a reliable sentencing process under the Fifth, Eighth, and Fourteenth Amendments, and his right to equal protection of the laws under the Fourteenth Amendment. He also maintains that the trial court should have instructed the jurors that they could only consider evidence of prior unadjudicated offenses if they believed beyond a reasonable doubt that he committed those acts and failure to provide such a instruction

violated his right to due process of law under the Fifth and Fourteenth Amendments.

At the onset Mr. Montoya concedes, as he must, that the Fifth Circuit has rejected challenges to Texas' sentencing scheme on these very same grounds. *See, Duff-Smith v. Collins,* 973 F.2d 1175 (5th Cir. 1992); *Landry v. Lynaugh,* 844 F.2d 117, 1121 (5th Cir. 1988), *cert. denied,* 488 U.S. 900 (1988); *Williams v. Lynaugh,* 814 F.2d 205 (5th Cir. 1987), *cert. denied,* 484 U.S. 935 (1987); *Milton v. Procunier,* 744 F.2d 1091 (5th Cir. 1984), *cert. denied,* 471 U.S. 1031 (1985). Likewise the Supreme Court of the United States has refused to issue writ of certiorari, thereby choosing not to address the issue. *Id.* Taking these cases into consideration it is the Opinion of the Court that Habeas should not issue on grounds fourteen and fifteen.

Montoya's last assertion in this area is that the trial court committed error in not instructing the jury that it could only consider the unadjudicated offenses if it was convinced that the defendant committed those acts beyond a reasonable doubt. In other words he is attacking the constitutionality of the Texas sentencing scheme and specifically how it addresses evidence of prior unadjudicated acts or aggravating circumstances. Likewise the Texas sentencing scheme has been upheld to be constitutional in that the narrowing function is performed at another stage in the proceedings[26] Therefore the trial court's failure to instruct the jury and the admission of

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[26] See claim number two, pg 14-16, infra.

the unadjudicated acts did not violate Montoya's constitutional right. Habeas is likewise denied pursuant to claim sixteen.

CLAIM 17

Claim seventeen maintains that Montoya's trial constituted a violation of law because he was convicted by an "unsworn jury". Specifically, he complains that in his case the trial judge requested his court coordinator to swear in the jury.[27] Montoya does not identify any relevant portion of the Constitution of the United States that was violated by this action.[28] Questions of purely state law are not addressed in federal habeas petitions. *Skillern v. Estelle*, 720 F.2d 839 (5th Cir. 1983), *cert. denied*, 469 U.S. 873 (1984). Therefore habeas is denied pursuant to this claim.

CLAIM 18

Montoya contends that his rights under the Fourth and Fourteenth Amendments were violated because the State failed to conduct a prompt judicial hearing into the existence of probable cause to hold him in custody.

In general, a jurisdiction that provides a judicial determination into probable cause within forty-eight hours of arrest will comply with the constitutional mandates of *Gerstien v. Pugh*, 420 U.S. 153 (1975). *County of*

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[27] The record reflects that the jury was sworn in by Veronica Garza.

[28] At the most this could constitute an issue of state law, however, Tex. Code Crim. Proc. art 35.22 provides that the jury is to be sworn in by the court or *under its direction*.

Riverside v. Mclaughlin 111 S.Ct. 1661, 1670 (1991). Montoya's claim in this regard rests on the Supreme Court's expansion of the definition of unreasonable delay. Specifically, delays for the purpose of gathering more information to justify the arrest, or a delay related to ill-will towards the defendant can result in constitutional violations. *Id.*

In this case the Petitioner points toward the fact that he was interviewed prior to being taken before a magistrate. Montoya was arrested between 10:00 pm and 11:00 pm on the evening of December 2, 1986. RXV 26, 30. The following morning an arrest warrant for murder was obtained and served at 11:45 pm. RXV 35, 53, 58. Montoya was interviewed in the morning some time prior to his being served. The probable cause hearing was had as soon as the magistrate returned from lunch on that same day. RXV 54-61.

There is no evidence in the record to support a determination that Montoya was held in order to gather more information or as a result of ill will. In fact, the Defendant appears to have been taken before a Magistrate within a reasonable time after his arrest and certainly within the confines of the forty-eight hour rule. Further the Supreme Court has maintained that although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. *Gerstien*. For these reasons Montoya has failed to state grounds upon which habeas relief may be forthcoming in claim eighteen.

CLAIM 19

In claim nineteen the Petitioner asserts that his right to a fair and impartial jury as guaranteed by the United States constitution was denied by the State's challenge for cause of venire person Sylvia Duran and the trial court's subsequent ruling. Specifically, Montoya mounts a two prong attack. He asserts that the State's challenge for cause was based "possibly on the ground" that she was unable to follow the courts instruction against inferring guilt if the defendant chose not to testify.[29] Secondly, the petitioner maintains that the State's challenge "may also have been based on" her responses to the State's inquiry as to her ability to apply the death penalty. *See, Witherspoon v. Illinios,* 391 U.S. 510 (1968) *(Death penalty cannot be returned by a jury whose possible members were excluded simply because they voiced general objections to the death penalty or expressed scruples against its infliction.)*

The Supreme Courts decision in *Witherspoon* was clarified in *Wainwright v. Witt,* 469 U.S. 412, (1985), wherein the court reaffirmed that the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath". The record reflects that Duran's first answers indicated that she would not want to be on a panel that must make a determination on the death sentence. RX 359. At first she

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[29] This of course is a challenge for cause that would benefit the defendant rather than harm him.

could not think of a single instance when she might be able to assess the death penalty, but after some examples by the prosecutor she indicated that there may be some instances when she could assess the death penalty. RX 359-61 Following this exchange is some fifteen pages of record concerning the juror's attitude on the Fifth Amendment. RX 364-69, 371-76 This second exchange ultimately resulted in her being struck for cause, see infra. In light of the record there does not appear to be any factual basis to support a claim pursuant to *Witherspoon*. Accordingly the Court denies this claim in as much as it concerns a *Witherspoon* claim.

The second challenge concerns the prospective juror's indication that she would be unable to follow the Court's instructions with regard to Fifth Amendment. The record indicates that Duran was unable to give a consistent response with regard to her ability to adhere to the court's instruction not to consider the defendant's right not to testify. After the court indicated that it was not satisfied that Duran could follow the court's instructions the prosecutor moved that she be struck for cause.

The petitioner fails to indicate an issue of law cognizable in a federal habeas petition, but rather raises an issue concerning state law. Nevertheless, the Court notices that the decision of a trial Court to excuse a juror for cause on the grounds of bias is within the firm discretion of the court. *United States v. Gordon*, 812 F.2d 115 (5th Cir.), *cert. denied*, 483 U.S. 1009 (1987). Therefore a trial court's findings may only be overturned in the face of manifest error. *Mu'min v. Virginia*, 500 U.S. ___, 111 S.Ct. 1899 (1991). Finding no manifest error present this Court

denies the Petitioners habeas claim pursuant to claim nineteen.

CLAIM 20

In this claim the Petitioner asserts that the prosecution violated the *Batson* rule and thereby violated the Fourteenth Amendment. *Batson v. Kentucy* [sic], 476 U.S. 79 (1986). His assertion is premised on the following events at the trial court as alleged in his petition.

> "After eleven jurors were selected, the next venire person to be called was Noah Gonzalez. Mr. Gonzalez failed to appear, so the court then called the next venire person, Patricia Loomis. The defense objected to Ms. Loomis being called out of order. After voir dire, Ms. Loomis was accepted by the state[30]. The defendant was denied an additional preemptory challenge in order to strike Ms. Loomis[31]. The Court's denial meant that Ms. Loomis would either be the twelfth juror or the alternate juror, unless Mr. Montoya agreed to waive Mr. Gonzalez from the panel. Mr. Montoya did not agree.
>
> Mr. Gonzalez was brought in the following morning. Before asking him any questions the state exercised a preemptory strike against Mr. Gonzalez. . . . "

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[30] A rather lengthy examination was conducted of Ms. Loomis.

[31] The defendant had utilized all of his preemptory challenges.

Mr. Montoya did not object on *Batson* grounds when Mr. Gonzalez was stricken[32], but now claims that he was stricken to exclude a hispanic from the jury.

"The Supreme Court's analysis in *Batson* presumed that an objection would be made promptly, probably before the venire panel was dismissed." *Jones v. Butler,* 864 F.2d 348, 370 (~~5th Cir.~~ 1988), *cert. denied,* 490 U.S. 1075 (1989). As a result the Fifth Circuit holds that where there has been no specific *Batson* objection at trial, a defendant fails to assert a proper *Batson* claim as a matter of federal law. *Harris v. Collins,* No. 92-2918, Slip. o. at 5 (5th Cir. April 22 1993); *Wilkerson v. Collins,* 950 F.2d 1054, 1063 (5th Cir. 1992).

Due to the forgoing habeas is denied on Batson grounds. Nevertheless, the Court wishes to point out that nine out of the twelve jurors who served on Mr. Montoya's jury had hispanic surnames. Further, the government had a perfectly non-racial reason for utilizing its preemptory strike on Mr. Gonzalez in that Ms. Loomis had already been qualified by a lengthly examination the day before while Mr. Gonzalez had not.

CLAIM 21

In claim twenty-one Montoya urges that one of his jurors, Norma Gonzalez knew the victim and that her failure to reveal this information at voir dire demonstrates bias and prevented him from receiving his right to a fair and impartial jury. He asserts this via an affidavit

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[32] The record is void of any objection after the strike. RXIII 1429-30

from one of Norma Gonzalez's co-jurors, Patricia Loomis. This affidavit is presented for the first time in his federal habeas petition.

The statutory requirement of exhaustion that is contained in 28 U.S.C. § 2254 is not satisfied by merely naming your claim in state court. *Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S.Ct. 1715, 1720 (1992). "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits" *Id.* The only exceptions to this requirement are a demonstration of cause for failure to develop facts and actual prejudice resulting from the failure, or if the failure to hold an evidentiary hearing would result in a fundamental miscarriage of justice. *Keeney.* The Court is of the opinion that neither of these exceptions has been meet.

Notwithstanding, even if Montoya's claim were taken on the merits the Court is of the opinion that it would fail. In order to obtain a new trial on these grounds the party must "demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause". *McDonough Power Equipment, Inc. v. Greenwould,* 464 U.S. 548, (1984). In promulgating this standard the Supreme Court noted that "to invalidate the result of a lengthy trial because of a juror's mistake, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give" *Id.* Montoya presents a second hand affidavit that is not only too late for consideration, inasmuch as it does

not fit into any of the exception noted supra, but also fails to demonstrate that the juror failed to answer honestly a material question[33].

For those reasons stated herein and above this Court rejects Montoya's contentions in claim twenty-four.

CLAIM 23

Montoya contends that evidence obtained in violation of his Fourth Amendment right against unreasonable search and seizure was improperly admitted at his trial and was not harmless error. Specifically he contends that the police had no probable cause to arrest him at the Texas Pool Hall, and that the physical evidence recovered from him incident to the arrest was inadmissible. Montoya did not raise this claim at the trial court or the appellate court level.

The Supreme Court has determined that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional manner was introduced at his trial. *Stone v. Powell*, 428 U.S. 465, 494 (1976) (*In the cases presented for review the petitioners had raised the Fourth Amendment issues at the trial court and at the appellate level*). The Fifth Circuit has interpreted the language in *Stone* to include cases where the petitioner

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[33] The affidavit of Loomis does not indicate when Gonzalez realized she knew the victim, or if this indeed did cause any bias. Further, Gonzalez's alleged contact with the victim came from her work at a restaurant the victim may have frequented.

did not avail himself of the state's procedure for determining and reviewing fourth amendment claims. *Caver v. State of Alabama,* 577 F.2d 1188, 1192 (5th Cir. 1977). (*The fact that petitioner did not raise the claim at the trial court did not prevent the Stone rule from applying*); *Hamilton v. McCotter,* 772 F.2d 171 (5th Cir. 1985). In order to obtain federal habeas review of a Fourth Amendment claim a Petitioner must present "sufficient factual allegations and proof that the state process is routinely or systematically applied in such a way as to prevent the actual litigation of Fourth Amendment claims on the merits." *Joshua v. Estelle,* 647 F.2d 377 (5th Cir. 1982), *cert. denied,* 459 U.S. 992, 103 S.Ct. 351 (1983).

Inasmuch as the rule in *Stone* applies to the petitioner's case and the petitioner has not alleged sufficient factual allegations and proof that the state process is applied in such a way as to prevent the actual litigation of the Fourth Amendment claims on the merits, Habeas relief is denied as to claim twenty-three.

CLAIM 25

The petitioner also contends that he received ineffective assistance of counsel under the sixth amendment. Precisely he contends that he was denied effective assistance of counsel for the following reasons: 1) counsel failed to object to the court's voir dire instructions, 2) counsel failed to obtain expert testimony to rebut fingerprint identification, 3) counsel failed to develop and present relevant mitigating evidence at trial, 4) counsel failed to raise any *Penry* claims or requests for *Penry* instructions, 5) counsel failed to ask that the jury be

instructed that the law of parties and the law of conspiracy does not apply at the sentencing hearing; 6) counsel failed to object in a timely fashion to the excusal of potential venire members by court personnel; 7) counsel failed to question juror Gonzalez sufficiently at voir dire to learn that she allegedly knew the victim, and 9) counsel failed to conduct adequate post-trial interviews with jurors.

The Supreme Court has established a two-prong test to evaluate ineffective assistance of counsel claims. *Strikland v. Washington,* 466 U.S. 668 (1984). First, the petitioner must demonstrate that his counsel's errors were so serious that his counsel was not functioning as the 'counsel' guaranteed him by the Sixth Amendment. *Id.* at 687. In other words, a defendant must show that in light of all the circumstances as they appeared at the time of the conduct, "Counsel's representation fell below an objective standard of reasonableness" i.e. "prevailing professional norms". *Id.* at 688. Second, even if counsel's representation falls below the standard, the defendant must also show that the prejudice was "so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable". *Id.* at 687 This prejudice can only be established by showing that there is a reasonable probability that "but for" the deficient representation the result of the proceeding would have been different. *Id.* The burden of proof in an ineffective assistance of counsel claim is that of a preponderance of the evidence. *Martain v. Maggio,* 711 F.2d 1273, (5th Cir. 1983), *cert. denied,* 469 U.S. 1028 (1984). Further, the Petitioner must demonstrate both deficient performance and the requisite prejudice in order to obtain habeas relief. *Strickland* at 697.

The Court has carefully considered each one of Montoya's assertion in claim twenty-four and concluded that he has failed to demonstrate the required level of deficient conduct or prejudice demanded by *Strickland* as a result his habeas claim of ineffective counsel is denied.

CLAIM 26

Here Montoya alleges that he received ineffective assistance of appellate counsel. The Supreme Court has not promulgated a standard for reviewing claims of ineffective appellate representation. *Evitts v. Lucey,* 469 U.S. 387 (1985). Therefore the Fifth Circuit applies the *Strickland* standard to these claims as well. *McCrae v. Blackburn,* 793 F.2d 684, 688 (5th Cir.), *cert. denied* 479 U.S. 965 (1986).

Likewise the Court is convinced that the Petitioner has not demonstrated that his appellate counsel's performance was contrary to an objective standard of reasonableness. Nor has the Petitioner demonstrated that but for his counsel's errors on appeal the outcome of his appeal would have differed. *See, Lockhart v. McCotter,* 782 F.2d 1275 (5th Cir. 1986). Consequently, Montoya has not met his burden under *Strickland.* This claim is denied.

CLAIM 27

Inasmuch as this Court is of the opinion that only claims number nine and twenty-four have merit, habeas pursuant to the cumulative error doctrine is denied.

CONCLUSION

Habeas relief pursuant to claims nine and twenty-four is hereby GRANTED and PROBABLE CAUSE GRANTED for those reasons stated therein and above. All other claims are denied.

DONE at Brownsville, Texas this 4th day of February, 1994.

/s/ Filemon B. Vela
FILEMON B. VELA
United States
District Judge

TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY Clerk
By /s/ Maxine Garza
Deputy Clerk

IRINEO MONTOYA, Appellant

No. 69,644, v. Appeal from Cameron County

THE STATE OF TEXAS, Appellee

OPINION

Appellant and his codefendant, Juan Fernando Villavicencio, were charged with murdering John E. Kilheffer while in the course of committing and attempting to commit the offense of robbery. Appellant was convicted of capital murder. Punishment was assessed at death.

In his eighth point of error, appellant argues that the evidence is insufficient to show that he was guilty of capital murder. Appellant argues that the evidence shows that he had no intent to either rob or kill the victim. Appellant asserts that at most he is guilty of theft. We disagree. During trial appellant's confession was admitted into evidence. The portion of the confession which we set out below and which was offered into evidence by the State clearly shows appellant's guilt as a party to the offense:

> "My name is Irineo Montoya and I'm known as 'El Ney.' I'm 18 years of age being born on June 3, 1967. . . .
>
> "On Sunday approximately three weeks ago, which I believed it to be November 17, 1985 at approximately 8:30 AM or 9:00 AM in the morning, I walked over to this friend of mines house, . . . I know him by first name only as Juan and he is also known by nickname as 'El Piolin.' Anyway, I went to his house so we could

go over to the Port of Brownsville Shrimp basin, . . .

" . . . When we got there the Port Guard told us that the Port was close (sic) because it was Sunday and that the Boat Captain's were not in, so he did not let us go into the Port. We then decided to start hitching a ride back to Brownsville. . . . we managed to stop a man who drove a Cheverolet (sic) Blazer which was black and gray in color, anyway the man who drove the Blazer was a gringo (anglo) who was old I guess he was around 50 years old, he had long gray hair and also had a gray beard. . . . Anyway he stopped and asked us where we were going, we told him that we were going into Brownsville, so he gave 'El Piolin' and myself a ride. . . . We then drove toward Brownsville. The Gringo started talking with Piolin and myself in Spanish.

" . . . We then decided to drive down to the Ringgold Park and cruise around. . . . 'El Piolin' who sat in the back seat took out a black push button knife and told me in Spanish 'Vamos a Rober al Gringo, . . .

"The Gringo, stopped near a resaca that is behind the Park, Juan 'El Piolin' then got off the Blazer and walked over behind the Blazer and took a leak (piss) . . . When 'Piolin' came back he opened the drivers (sic) side door where the Gtingo (sic) sat and he took the black knife and started piking (sic) the Gringo with the knife, so the Gringo would move, . . . I then grabbed the Gringo, by the neck and went with him to the back seat. 'El Piolin,', . . . started to stab the gringo with the kinife (sic) . . . But he was cutting him all over on the legs and body, but

the Gringo kept fighting us. I than (sic) took out a gun that I had with me but I did not have any bullets inside as the gun did not work. I then begin (sic) to hit the Gringo with the gun, . . . 'El Piolin' then drove tp (sic) the river levee near the Rio Grande River by Southmost Area where we drove to some torronjaes (Grapefruit trees) where we stoped (sic) in the trees and took out the Gringo, who was all bloddy (sic), he was still alive when we dragged the Gringo to some trees, . . . After we finished robbing the Gringo of a gold chain with a gold cross that he wore on his neck, a gold ring that he wore on one of his fingers, we took off his pants Blue Jeans, and a pair of Tennis shoes I don't remember the color.

"Anyway we wanted to rob him so we took his wallet and 'El Piolin' threw the pants away, we got back into the Gringo's Blazer . . . he took out the money that was inside the man's wallet. I believe it was around $80 American Dollars. We then drove over to 'El Piolin's' house where he parked the Gringos Blazer in the alley that is on 12th Street next to a garage that I do not know the name off (sic).

. . . "

The jury was charged that they could convict appellant if they found that he was "acting alone or with another person." In his confession appellant admitted holding the victim while Juan Fernando stabbed him. Appellant also admitting robbing the victim after he and Juan Fernando had drug the injured victim out of the Blazer. Clearly this evidence shows that although appellant himself did not stab the victim he aided Juan Fernando in murdering the victim and later in robbing the victim. V.T.C.A., Penal Code, Section 7.02(a)(2). Viewing

the above evidence in the light most favorable to the verdict, we find the evidence sufficient to support appellant's conviction for capital murder.

In his tenth point of error, appellant argues that the trial court should have entered an acquittal after the State introduced into evidence appellant's exculpatory statement and then failed to disprove it. Appellant maintains that the State introduced appellant's entire confession into evidence and thus was bound to prove the exculpatory material contained in the unhighlighted portions of the confession.

It has long been the rule that when the State introduces a defendant's confession it is bound by any exculpatory portions of the confession unless it otherwise disproves the exculpatory facts beyond a reasonable doubt. Cannon v. State, 691 S.W.2d 664 (Tex.Cr.App. 1985); Palafox v. State, 608 S.W.2d 177 (Tex.Cr.App. 1979).

Our reading of the record in this case leads us to two conclusions: first, the *Palafox* rule is inapplicable to the instant case because the State did not introduce into evidence any exculpatory portion of appellant's confession; second, appellant, in his brief has seriously misrepresented the record. The record reflects that during the State's direct examination of Sgt. Luis Martinez of the Cameron County Sheriff's office, the following occurred:

> "MR. MOSBACKER [prosecutor]: We offer the statement, Your Honor, those portions highlighted.
>
> "MR. CANTU [defense attorney]: Objection.
>
> "THE COURT: The objection is overruled.

"MR. MOSBACKER: 64a, Your Honor.

"THE COURT: On 64a the State is offering into evidence only those portions that are marked in yellow on the statement, and they are received. (State's Exhibit No. 64a was received in evidence.)

"MR. MOSBACKER: Your Honor, may I have the witness read the highlighted portions at this time to the jury?

"THE COURT: All right.

"MR. CANTU: Under the rules, Your Honor, I am still preserving my objections to the admissibility of the statement.

"THE COURT: Yes.

"MR. CANTU: I ask the jury be allowed to hear all of the document.

"THE COURT: You can offer the rest of it. You are offering the rest of it?

"MR. CANTU: I'm still preserving my objection.

"THE COURT: All right.

"BY MR. MOSBACKER:

"Q. Mr. Martinez, would you please read the entire statement including the highlighted portions?

"MR. CANTU: I'm sorry. What were those instructions?

"THE COURT: He's going to read the whole statement.

"MR. MOSBACKER: Your Honor, it's all – In other words, at this time I would ask that he

> read the entire statement, keeping in mind for the jury's information that we're only offering the highlighted portions when they get to see the statement themselves.
>
> "THE COURT: All right. Proceed."

Thereupon Sgt. Martinez read the entire statement to the jury.

Evident from the above exchange is the fact that it was appellant and not the State who was offering the unhighlighted portion of the confession into evidence. Thus the rule in *Palafox* is inapplicable to the instant case. Although the procedure used in this instance was unorthodox in that at the time the case was tried the usual procedure was to wait until cross-examination to introduce the remainder of the confession, it is apparent that it was defense counsel's intention to introduce that portion of the confession which was not introduced by the State. See Article 38.24, V.A.C.C.P. (1985) (repealed effective September 1, 1986 and now embodied in Tex. Rules Crim. Evidence, Rules 106 and 107). A reading of the highlighted portion of the confession which was previously set out in our discussion of appellant's eighth point of error reveals nothing which exculpates appellant. Based on all of the above, we hold that the trial court did not err in denying appellant's request for acquittal.

Appellant also argues that the court committed fundamental error in not instructing the jury that exculpatory statements introduced by the State must be regarded as true unless disproved. Appellant concedes that he did not request such an instruction.

We have already concluded that the portion of the confession introduced into evidence by the State did not contain any exculpatory material. Thus there was no need for such an instruction. Cannon v. State, supra; Daniel v. State, 668 S.W.2d 390 (Tex.Cr.App. 1984). Appellant's eleventh point of error is overruled.

In another point of error dealing with the court's charge, appellant argues that the court erred in failing to instruct the jury on the law regarding circumstantial evidence. An examination of the court's charge shows that the jury was properly instructed on the presumption of innocence, the State's burden of proof, and the requirement that appellant be acquitted if there was a reasonable doubt of his guilt. It has been the position of this Court that if a jury is properly instructed in these areas, a charge on circumstantial evidence is no longer required. DeLuna v. State, 711 S.W.2d 44 (Tex.Cr.App. 1986); Mulder v. State, 707 S.W.2d 908 (Tex.Cr.App. 1986); Hankins v. State, 646 S.W.2d 191 (Tex.Cr.App. 1983) (Opinion on State's Motion for Rehearing). This point of error is overruled.

The indictment in the instant case alleged in pertinent part that:

> "Irineo Montoya, . . . and Juan Villavicencio, . . . did then and there unlawfully, intentionally and knowingly cause the death of John E. Kilheffer, the deceased, by stabbing the deceased with a knife, which then and there in the manner of its use or intended use was capable of causing serious bodily injury or death, and the said defendants were then and there in the course of committing and attempting to

commit the offense of robbery of John E. Kilheffer, . . . "

The trial court's charge to the jury contained a number of different abstract instructions and paragraphs applying the law to the facts. Paragraphs 6 and 7 applied the law of parties to the instant case – "acting alone or with another person." Paragraph 8 contained the abstract law of parties. Paragraph 9 contained the law pertaining to conspiracy:

"9.

"If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, then all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out the conspiracy. Capital Murder, murder, robbery, and attempted robbery are felonies.

"By the term 'conspiracy' as used in these instructions, is meant an agreement between two or more persons, with intent that a felony be committed, that they, or one or more of them, engage in conduct that would constitute the offense. An agreement constituting a conspiracy may be inferred from acts of the parties.

"10.

"Now, if you find from the evidence beyond a reasonable doubt that Irineo Montoya . . . and Juan Villavicencio . . . entered into an agreement to commit the offense of robbery, as above defined, of John E. Kilheffer, and pursuant to

> that agreement, they did carry out their conspiracy and that on or about the 17th day of November, 1985 in Cameron County, Texas, while in the course of committing such robbery, Juan Villavicencio . . . intentionally caused the death of John E. Kilheffer, by stabbing him with a knife with the specific intent to kill John E. Kilheffer, and that the defendant Irineo Montoya . . . pursuant to the conspiracy, if any, with the intent to promote and assist Juan Villavicencio . . . in the commission of said robbery, then and there, at the time of the stabbing, was acting with and aiding, or attempting to aid, Juan Villavicencio . . . in the execution of the robbery of John E. Kilheffer, if any, and that the stabbing of John E. Kilheffer was committed in furtherance of the conspiracy, if any, of Irineo Montoya . . . and Juan Villavicencio . . . to rob John E. Kilheffer, and that the stabbing of John e. Kilheffer, if any, was an offense that should have been anticipated as a result of the carrying out of the conspiracy, then you will find the defendant, Irineo Montoya aka 'El Ney', guilty of Capital Murder.
>
> "Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant, Irineo Montoya . . . of Capital Murder."

Appellant argues that the inclusion of the theory of conspiracy in the court's charge over his objection constituted fundamental error because the offense of conspiracy had not been alleged in the indictment. He reminds us that criminal conspiracy is an offense under V.T.C.A., Penal Code, Section 15.02, and argues that since he had

no notice he was being charged with the offense of criminal conspiracy, the jury was erroneously instructed on an alternate theory of conviction.

Appellant is mistaken in his argument. The court's charge did not instruct the jury to consider whether appellant was guilty of the separate offense of criminal conspiracy as set out in Section 15.02, supra. Rather the court's charge merely contained an alternative "parties" charge as provided in V.T.C.A., Penal Code, Section 7.02(b). That section provides as follows:

> "(b) If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy."

It is well accepted that the law of parties may be applied to a case even though no such allegation is contained in the indictment. English v. State, 592 S.W.2d 949 (Tex.Cr.App. 1980); Pitts v. State, 569 S.W.2d 898 (Tex.Cr.App. 1978). This rule applies not only to the law of parties found in Section 7.02(a)(2) but also the law of parties found in Section 7.02(b). Leger v. State, 688 S.W.2d 130 (Tex.App. – Beaumont 1985, no petition). Our examination of case law shows that the theory of criminal responsibility set forth in Section 7.02(b) has often been applied in capital murder cases. Wallace v. State, 618 S.W.2d 67 (Tex.Cr.App. 1981); English v. State, supra; Ruiz v. State, 579 S.W.2d 206 (Tex.Cr.App. 1979); Wilder v.

State, 583 S.W.2d 349 (Tex.Cr.App. 1979); Rogers v. State, 662 S.W.2d 13 (Tex.App. – Tyler 1983, petition refused); Koonce v. State, 654 S.W.2d 705 (Tex.App. – Houston (14th Dist.), petition refused).

In the instant case, the evidence, as demonstrated by appellant's confession set out above, clearly supported the submission of a charge on criminal responsibility pursuant to Section 7.02(b). Appellant's sixth point of error is overruled.

In his ninth point of error, appellant argues that the court erred in not sentencing him to a life sentence after the jury notified the court that it could not reach a verdict. The record reflects that the jury began its deliberations on punishment at 1:00 p.m. on June 17, 1986. At 2:40 p.m., a hearing was convened outside the presence of the jury at which time the trial read two notes received from the jury. The first note read:

> "We have not been able to reach a unanimous decision on yes or no."

The second note read:

> "We are awaiting further instructions. We are all definite in our decisions."

The court prepared a response which asked the jury to indicate the numerical vote of the jury. Appellant objected on the basis that because the jury was unable to reach a verdict, he should be sentenced to life imprisonment in accordance with Article 37.071(e), V.A.C.C.P. He also argued that any further communication by the court with the jury would amount to an instruction by the court

on the way the jury should vote. The court overruled appellant's objections.

In response to the trial court's note the jury responded that it was divided nine to three on Special Issue No. 1 and ten to two on Special Issue No. 2. Appellant again objected and asked that he be given a life sentence. The State argued in response that since the jury had only been deliberating for a period of less than two hours that they should be instructed to continue their deliberations. At 2:59 p.m., over appellant's objection, the court sent the following note to the jury:

> "Would you please deliberate for another 30 minutes to see if you are able to reach an answer to the special issues in accordance with the Court's instructions and please report to me after that."

At 3:41 p.m., the court was notified that the jury had reached a verdict.

Appellant is correct that Article 37.071(e), supra, provides that if the jury is unable to answer any special issue, the defendant is to be assessed a life sentence. However, Article 37.071(e), supra, must be read in conjunction with Article 36.31 V.A.C.C.P., which provides that:

> "After the cause is submitted to the jury, it may be discharged when it cannot agree and both parties consent to its discharge; or *the court may in its discretion discharge it where it has been kept together for such time as to render it altogether improbable that it can agree.*" (emphasis added)

Length of time that the jury may be held for deliberation rests in the discretion of the trial judge. Unless the record reveals that the trial court abused its discretion in holding the jury for deliberations, reversal is not mandated. DeLuna v. State, 711 S.W.2d 44 (Tex.Cr.App. 1986); Andrade v. State, 700 S.W.2d 585 (Tex.Cr.App. 1985). Muniz v. State, 573 S.W.2d 792 (Tex.Cr.App. 1978).

This Court has considered situations very similar to the instant case in the past. In Marquez v. State, 725 S.W.2d 217 (Tex.Cr.App. 1987), the jury sent a note indicating a deadlock after only two hours and twenty-five minutes of deliberation on the capital murder special issues. After being instructed to continue their deliberations, the jury deliberated an additional forty minutes before reaching a verdict. We held that considering that Marquez was on trial for capital murder and the relatively short period of deliberation on punishment, the trial court did not abuse its discretion.

In *Andrade*, after considering the nature of the case, also a capital murder case, we found no abuse of discretion where after four and a half hours of deliberation, the jury notified the court they could not agree on an answer to the first special issue. The judge instructed the jury to continue their deliberations and a verdict was reached after approximately eight more hours.

We also found no abuse of discretion in *DeLuna* where the record reflected the jury had deliberated on the special issues from sometime before lunch until shortly before dinner the same day when they informed the court that they could not reach an answer to the second special issue. After questioning the jurors as to whether they

thought they could reach a verdict if given more time, the trial court asked them to continue their deliberations. Sometime that evening the jury returned with affirmative answers to both special issues.

We find no abuse of discretion in the instant case where prior to informing the jury that they could not reach a unanimous verdict, the jury had only deliberated for one hour and forty minutes.

In the same point of error, appellant asserts that the judge's instruction to deliberate for thirty more minutes constituted an "Allen" charge because it coerced the jury into thinking that they had only thirty minutes in which to reach a unanimous decision. He further argues that the fact that they reached their verdict some thirty-three minutes reflects that pressure. We disagree.

An "Allen" charge is one given to a deadlocked jury which indicates to a juror that some deference is owed to the opinion of the majority of the other jurors. Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). The instruction in the instant case directing the jury to deliberate thirty more minutes cannot be construed to be a coercive "Allen" charge. The trial judge's instruction did not pressure the jurors into reaching a verdict nor did it contain any additional instructions as to the law. Muniz v. State, supra. Appellant's point of error is overruled.

In the next five points of error, appellant complains of error which he asserts occurred during the voir dire examination of the prospective jurors. Before we discuss the merits of appellant's arguments, it is important to remember that we review the voir dire from a cold

record. Recognizing that the trial judge has the opportunity to view the venireman's demeanor with all that that encompasses, we are bound to affirm the trial court's excusal of a prospective juror if there is any adequate basis in the record to support the trial court's decision. Livingston v. State, 739 S.W.2d 311 (Tex.Cr.App. 1987); Barnard v. State, 730 S.W.2d 703 (Tex.Cr.App. 1987); Gardner v. State, 730 S.W.2d 675 (Tex.Cr.App. 1987).

In points of error one, three and four appellant urges that the trial court erred in excusing three jurors upon the State's challenge for cause. Appellant's first point of error concerns venireperson Sylvia Garcia Duran. The record reflects that Duran equivocated throughout her voir dire examination on the question of whether she could follow the trial court's instruction and not consider the defendant's failure to testify in her deliberations.

Initially the record shows that Duran did not understand that a defendant had the right not to testify. After the prosecutor explained to Duran that a defendant did not have to testify, the following occurred:

> "Q. Yes. I'm telling you he does not have to take the stand and testify. He does not have to present any evidence in the case. Would you hold it against him if he did not present any evidence?
>
> "A. I wouldn't know.
>
> "Q. You wouldn't know?
>
> "A. I wouldn't know. I guess –
>
> "Q. In other words, when you went back there in the jury room and the defendant did not testify, could you just say, 'Well, I'm going

to decide the case on the evidence, like the judge told me, and not even consider the fact that he didn't testify'? Could you decide the case on the evidence that was given to you, or would you consider the fact that he didn't testify?

"A. I think I would probably consider that.

"Q. Even if the judge told you you're not supposed to do that?

"A. Well, then, again, I would say that it depends on the evidence.

"THE COURT: You could follow the Court's instructions. If I told you, 'Don't consider that, don't mention it, don't even think about it,' could you follow my instructions?

"VENIREMAN DURAN: If that's the rule, yes.

"THE COURT: That would be the instruction. That's what I would be telling you. 'Just consider the evidence.' Could you follow the Court's instructions? Could you?

"VENIREMAN DURAN: It's hard.

"THE COURT: Well, I know that. Nothing here is easy. I need to know that if I tell you to do something you're going to do it. Are you saying, 'Judge, that may be the law but I just can't follow it'?

"VENIREMAN DURAN: That's why I say that, because if you don't think that there's enough evidence –

"THE COURT: No, no, no. I'm going to tell you in this case . . . I would say, 'In this case the defendant has elected not to testify, and I'm

instructing you that when you go back to deliberate you cannot refer to that fact, you cannot allude to it, consider it, for any purpose whatsoever. You just decide the case on the evidence you heard here.' Now, can you follow that instruction?

"VENIREMAN DURAN: I guess so.

"THE COURT: Well, I need to know. Yes or no. Can you follow the instruction? If I tell you that's the law, that's what you have to do.

"VENIREMAN DURAN: It's just that how do you know that – I don't know.

"THE COURT: I don't know what the evidence is going to be. Now, if you listen to just the evidence and you say, 'Well, you know, the State didn't prove it; I have to vote not guilty.' Or you say, 'The evidence is there; I vote guilty.' But just don't consider whether he testified or not; just on what you heard here. Can you do that?

"VENIREMAN DURAN: I would say no."

The court then turned the questioning over to defense counsel who began by explaining the history and purpose behind the Fifth Amendment. After his initial explanation, the following occurred:

"Q. . . . And if a defendant doesn't want to testify you can't use it against him. You can't think about it because you have to decide the case on the evidence; all right? Do you have any problem with that?

"A. (Shaking head negatively.)

. . .

"Q. So if I told you, – and the Court told you while ago – 'Ladies and Gentlemen, you are to decide this case based on the facts presented and you are not to consider in your decision whether the defendant has testified,' do you think you could follow the judge's instruction?

"A. I don't know.

"Q. You don't know.

"A. No.

"Q. What question do you have? Are you confused on what I've explained to you?

"A. Well, no. It's just my personal belief. That's it.

"Q. And you feel that you could not set that aside and, just based on the facts of the case, decide it and not consider whether a defendant has or not testified?

"A. (No response.)

"Q. Huh?

"A. I think it's – Do I have to answer that?

"Q. Well, would you like me to put it to you another way, give you another example?

"A. Because if I feel like that he's supposed to testify, you know, I feel he should.

"Q. Well, I can understand that. I can understand that. It's not quite what you're being asked. Judge Chavez told you that he would instruct you in a given case you would be on, not this one but some other case, he would tell you that you had to

decide whether the person is guilty or not guilty based on what you heard from the witness stand, witnesses, the evidence, and things like that, and that you had to be convinced beyond a reasonable doubt. You understand that?

"A. (Nodding head affirmatively.)

. . .

"Q. The Court would also instruct you not to consider, when you're deciding the guilty or not guilty, whether the person has or has not testified, because like I said, that's the Fifth Amendment right. That has nothing to do with the case. You have to decide it. It's the State's accusation and they have to prove it. You would have to follow the Court's instruction. Could you do that?

"A. Yes."

At that point defense counsel concluded his questioning. When the prosecutor attempted to question Duran again he was cut off by the judge who said he was not satisfied that Duran could follow the court's instruction. He then asked the prosecutor if he would like to challenge Duran for cause. When the prosecutor responded affirmatively, the judge excused the Duran over defense counsel's objection.

Article 35.16(b)(3), V.A.C.C.P., authorizes the State to challenge for cause any venireman who has a bias or prejudice against "any phase of the law upon which the State is entitled to rely for conviction or punishment." Although Duran's last answer seems to indicate that she

could follow the trial court's instructions and not consider a defendant's failure to testify, the bulk of the voir dire examination shows that Duran was confused, hesitant and that she personally believed a defendant should testify. Reviewing the *entire* voir dire examination as we must, Clark v. State, 717 S.W.2d 910 (Tex.Cr.App. 1986), and giving due deference to the trial judge who was in a position to evaluate the venireman's comprehension of the questions, the venireman's sincerity and the venireman's demeanor, we find an adequate basis in the record to support the trial court's conclusion that Duran would not be able to follow the law in this area.

In his third and fourth points of error, appellant complains that venirepersons Alma Caballero and Alberico Guajardo were excused in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1969). As we noted in Smith v. State, 744 S.W.2d 87 (Tex.Cr.App. 1987), *Witherspoon* is no longer the standard for determining whether a challenge for cause by the State has been improperly granted. The standard we now use is that enunciated in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985): A juror may not be challenged for cause based on his views about capital punishment *unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.*

Alma Caballero initially equivocated in voicing her feelings as to the general question of whether the death penalty would be ever justified. However, when the questioning zeroed in on whether she herself could ever answer the special issues affirmatively knowing that a sentence of death would result, Caballero was unyielding

in her resolve not to render a "yes" answer. In an attempt to rehabilitate her, defense counsel posed a hypothetical situation to the prospective juror and then asked if she could render affirmative answers to the two special issues. Caballero did reply that based on the evidence alone, she could answer the questions "yes." However, she then immediately qualified her answer:

> "A. But you're not talking about sentence him to death; right?
>
> "Q. The question is, could you answer the questions yes based on the evidence in the example that I gave you?
>
> "A. This does not have anything to do with the death or it does?"

When the court intervened and explained that affirmative answers to both questions would mandate him to impose the death penalty, Caballero reiterated that she could not give the death penalty.

Apparent throughout the questioning was the fact that the potential sentence of death would affect how Caballero would answer the special issues. Under the standard enunciated in *Wainwright*, the trial court acted properly in granting the State's challenge for cause. Appellant's third point of error is overruled.

In his next point of error, appellant argues that prospective juror Alberico Guajardo was improperly excused in violation of Witherspoon v. Illinois. Appellant is mistaken as to the reason Guajardo was excused. The record shows Guajardo was excused because he could not understand English. Prior to the commencement of his voir dire examination, Guajardo had informed the bailiff

that he needed the assistance of an interpreter. During questioning by the prosecutor Guajardo testified that he had a limited understanding of English. Although the prospective juror was able to voice his opposition to the death penalty, the record reflects that he became confused when the prosecutor attempted to explain the procedure at the punishment phase of a capital murder case. When the court questioned him as to whether he had understood the preliminary instructions given to him prior to the beginning of individual voir dire, Guajardo testified that he understood only a small portion of the instructions. Thereupon the trial judge *sua sponte* excused Guajardo over defense counsel's objection.

In Goodman v. State, 701 S.W. 2d (Tex.Cr.App. 1985), the trial judge *sua sponte* excluded the prospective juror pursuant to Art. 35.16(a)(11) because he could not read or write English. Holding that this *sua sponte* action by the trial court was an erroneous exclusion of a *disqualified* juror, this Court found that reversal was mandated only if Goodman could show that he was tried by a jury to which he had a legitimate objection. Since Goodman's only allegation of harm was the State's use of all of its peremptory challenges and since the record failed to reveal that Goodman was tried by a jury to which he had a legitimate objection, this Court found no reversible error.

Applying *Goodman* to the instant case, we also find that the trial court's error in excusing Guajardo *sua sponte* does not constitute reversible error. The record clearly demonstrates that Guajardo had trouble understanding English and thus was excludable under Art. 35.16(a)(11). Appellant's only allegation of harm is that he was not

allowed the opportunity to question Guajardo before the trial court excused him. We find nothing in the record to suggest that appellant was tried by a jury to which he had a legitimate objection. Consequently, we find no reversible error. Appellant's fourth point of error is overruled. See Green v. State, 764 S.W.2d 242 (Tex.Cr.App. 1989).

In the next two points of error, appellant argues that the trial court erred in denying his challenges for cause. In his second point of error, appellant argues that the court should have granted his challenge of Cheryl Gray because it was clear from her testimony that she had a bias in favor of police officers. During the defense voir dire examination of Gray, she admitted she would have a tendency to believe a police officer's testimony:

"Q. Do you feel that a police officer should be given more credence to what he says by the very nature of the fact that he holds the office of a policeman?

"A. I probably would have more feeling that I would trust him, yes.

"Q. Would you tend to believe him, let's say, if it was a matter between two people saying that they saw something? Would you tend to believe him over that other person because he is a police officer?

"A. Because he is a police officer?

"Q. Yes. By the nature of his office.

"A. Probably, yes.

"Q. Could you consider that a police officer could take that stand and sit there and commit perjury, could lie on the stand?

"A. I guess so. I would not want to believe that.

"Q. Then you couldn't believe it?

"A. It would be difficult.

"THE COURT: Are you saying you wouldn't believe it or you could believe it? Would you consider that he might make a mistake or lie?

"VENIREMAN GRAY: That's what I'm saying. I wouldn't want to believe it but I could believe it. I wouldn't want to, but there's – you know, it's just like you take any other people and you're talking to them. He's not going to have – I would want to believe, because he's a police officer, that I could believe him and trust him in what he had to say. But listening to everybody, you're going to take into account each one of those people and who you believe or not believe.

"THE COURT: What if a real good friend of yours testified to one thing and a police officer came in and testified to something else?

"VENIREMAN GRAY: Well, but you have to take into account that everybody else that comes in tells the truth you have to say, 'I believe what this one says' or 'I believe what that one says.' if everything else stacked up against him, you know, you have to take into account everything that's said.

"Q. BY MR. CANTU: Well, listen to the words you've said, 'if everything else stacked up against him.'

"A. That's what I said. I would want to believe him, but there's a possibility I may not, depending on everything else that occurs.

. . .

"Q. In regard to policemen and a civilian, the only point we're getting to here is that when they sit there they sit there naked, no badge, no gun, no bionic eyes, nothing. They are just citizens. Would you accept them like that or, really, are you saying, 'I'm going to weigh it. But, really, I'll believe the policeman until I see more than one witness different'?

"A. That's what I'm saying.

"Q. That it's not enough to have a shooting match between two guys. If one of them is a policeman you're going to believe the policeman unless that other person has more; right? Is that what you're saying?

"A. (Witness nodding head affirmatively.)

At that point, appellant challenged Gray for cause and the State attempted to rehabilitate her.

"Q. . . . Are you saying that you would decide whether to believe a police officer or any other witness based on what the evidence was in the entire case?

"A. That's what I was trying to say.

"Q. And if you have a police officer and a witness that are diametrically opposed you

would look at the entire evidence to determine who is more credible?

"A. Yes.

"Q. It wouldn't be just because he was a police officer that you would believe him?

"A. That's what I was saying. You all get us very confused over here. If I have two stories, I probably would want to believe that that police officer was telling the truth and I would probably believe him more than I would the other person.

"Q. But it would depend on the police officer who was testifying?

"A. That's true. And it would depend on all the rest of the evidence that has been coming up.

"Q. In other words, you may have a police officer who you don't believe, you don't like the way he looks, you don't trust him. In other words, could you consider that you might have a police officer up there that you don't trust?

"A. Yes. I stated that also.

"Q. So you're not saying, 'Every police officer I'm going to believe, no matter what, unless I'm shown completely opposite'; you are saying you would weigh each witness as they come. Police officers would you weigh like everybody else, what they testified to, how they testified, and whether it was credible?

"A. Whether it was credible. That's my comment. It depends on all the other evidence

that comes forward. But personally I would want to believe that police officer.

"Q. You would want to believe him?

"A. That's right.

"Q. But once the situation came into effect and you were sitting as a juror and you were watching these witnesses testify you would judge them to the best of your ability on how they testify and how their stories went along with the rest of the evidence?

"A. Yes, sir."

The court overruled appellant's challenge for cause and the appellant was forced to use a peremptory challenge on Gray.

Article 35.16(a)(9), V.A.C.C.P., provides that either the State or the defense may challenge a juror for cause if the juror has a bias or prejudice in favor of or against the defendant. In a situation where a prospective juror testifies that he or she believes a police officer would always tell the truth, this Court has construed such a belief to constitute a bias or prejudice against the defendant. Hernandez v. State, 563 S.W.2d 947 (Tex.Cr.App. 1978). After reviewing the complete voir dire of Gray, we find that the trial court did not abuse its discretion in overruling appellant's challenge for cause. While Gray did initially testify that she would tend to believe a police officer because of the position he or she held, it became apparent by the end of the voir dire examination that in a trial situation she would judge each individual's credibility based on his testimony as it related to the rest of the

evidence adduced during the trial. We find Gray's testimony easily distinguishable from the juror in *Hernandez* who testified that she believed a police officer would always tell the truth. Appellant's challenge for cause was properly overruled. Gardner v. State, 730 S.W.2d 675 (Tex.Cr.App. 1987). Appellant's second point of error is overruled.

In his fifth point of error appellant argues that the court erred in denying his challenge for cause of Maria Guadalupe Hernandez because she could not accord him his constitutional right against self-incrimination. During questioning by the State, Hernandez testified that she understood a defendant's right not to testify and would not hold it against a defendant if he did not testify.

> "Q. . . . If the evidence you heard convinces you that he's guilty you can find him guilty whether he testifies or not. But if the evidence you've heard doesn't convince you that he's guilty, if you're not convinced he's guilty from the evidence you've heard, you can't consider the fact he didn't testify as any evidence of his guilt. Do you understand that?
>
> "A. Yes.
>
> "Q. So, would you be able to do that and not hold it against him that he didn't testify even though you might be curious, because you just decide the case based on what you heard, not on what you're guessing?
>
> "A. Yes. Just on what I heard, yes.

"Q. Okay. And not hold it against the defendant if he doesn't testify.

"A. Right."

During questioning by the defense, Hernandez appeared to hedge on her earlier answers.

"Q. Can you sit there and tell us and be as honest with yourself as you can that you could decide a case based solely on the evidence the State presented and that you would not consider the fact that a defendant did not put on any evidence and did not testify?

"A. I could but I'd still keep wondering why he didn't, I guess. Well, I know –

"Q. That's the scary part about wondering. Are you actually considering it, then?

. . .

"A. I guess I would be if I would be wondering about it still in the back of my mind while I was looking at all the other evidence that was presented."

At this juncture, the appellant interposed a challenge for cause. The State again questioned Hernandez is an attempt to rehabilitate her.

"Q. . . . If a defendant does not testify the judge will instruct you that the law is you cannot consider that as any evidence of his guilt; that you have to decide the case based on the evidence that you heard and not speculate on why he testified or why he didn't.

"A. Okay.

"Q. Could you follow that law and decide the case based only on the evidence you've heard and not consider the fact that he didn't testify? In other words, could you follow the Court's instruction?

"A. Well, not in my own mind I couldn't. I mean I could follow instructions but I would still have that right in the back of my mind. I would keep thinking about it even though I would be saying, 'Well, we're not supposed to think about that.' I'd still be thinking about it.

"Q. Would you consider it as evidence of his guilt? That's what I'm asking, because you can't consider it as evidence of guilt. What I'm saying is, you can't sort of say, 'This isn't beyond a reasonable doubt but I'm going to add on his failure to testify and that will make it beyond a reasonable doubt.' You have to decide the case based on the evidence.

"A. That I could do. The thing that would bother me is, like why didn't he – Oh, how can I explain it? If the evidence was more like towards him being guilty, I guess he would be guilty, then I would keep thinking, 'Why doesn't he try to prove he isn't guilty if he isn't?' I guess I'm really confused about that.

"Q. I'm not asking you to say, 'Well, the evidence shows he's guilty, you can find him guilty.'

"A. But I mean if the evidence showed he was innocent I wouldn't say he was guilty just because he didn't testify.

"Q. That's what I'm saying. You wouldn't hold that against him and use that as an item of guilt?

"A. No.

"Q. But if he was guilty you would just decide it based on the the [sic] evidence you heard?

"A. Yes.

"Q. You wouldn't use the fact he didn't testify against him, is what I'm asking?

"A. No."

The trial court overruled appellant's challenge for cause and the defense excused Hernandez by means of a peremptory challenge.

Article 35.16(c)(2), V.A.C.C.P. authorizes the defense to challenge for cause any venireman who has a bias or prejudice against any of the law upon which the defendant is entitled to rely. Consequently, if a prospective juror testifies that he cannot afford a defendant his right against self-incrimination, a challenge for cause by the defendant would be proper under Article 35.16(c)(2).

In the instant case, prospective juror Hernandez admitted she would wonder why a defendant would not testify in his own behalf. But when she was pinned down as to whether she could follow the court's instruction and not consider the defendant's failure to testify when making a determination of guilt, Hernandez clearly testified that she could follow the court's instruction. We find that the record supports the trial court's decision. Satterwhite v. State, 726 S.W.2d 81 (Tex.Cr.App. 1986). Appellant's challenge for cause was properly overruled.

Next, appellant contends that his confession was not voluntarily made and thus the court erred in admitting it into evidence. Prior to trial the court held a hearing concerning the voluntariness of the confession. After the hearing the trial court entered an order finding that appellant knowingly and voluntarily confessed after being given his statutory warnings pursuant to Article 38.22, V.A.C.C.P. The court also found that appellant was not induced, coerced or threatened in any way to give his confession.

The undisputed evidence shows that appellant was arrested on the night of December 2, 1985 for possession of marijuana. Shortly after his arrest, the police learned of appellant's involvement in the instant offense and placed a hold on him for capital murder. Around 11:15 p.m., Joe Garza, an investigator with the Cameron County District Attorney's office, attempted to interview appellant but after determining that appellant was intoxicated had him returned to the county jail. Appellant testified at the hearing that he was then placed in a padded solitary confinement cell where he was unable to sleep because of a continuously burning light and because he was cold. None of the State's witnesses could verify that appellant had been placed in such a cell but all testified that they had not ordered such a placement. The next morning at approximately 11:30 a.m., appellant was taken to the sheriff's office where he was interviewed by Garza and Sgt. Luis Martinez of the Cameron County Sheriff's office. Appellant's rights were read to him in Spanish by Martinez and appellant acknowledged that he understood them. He was then informed that he was under arrest for capital murder and his rights were again read

to him in Spanish. Again appellant acknowledged that he understood them. The investigators then asked appellant if he would like to give a statement. Appellant replied affirmatively. The investigators then obtained the form upon which statements are written and proceeded to read to appellant in Spanish the statutory rights printed at the top of the form. After acknowledging that he understood those rights, appellant began dictating a statement to Sgt. Martinez. As appellant spoke in Spanish, Martinez wrote the statement out in longhand in English. Following the completion of appellant's dictation, Martinez read the statement back to appellant in Spanish. Appellant desired to make no changes so Sgt. Martinez then typed up the statement. Thereafter two secretaries from the sheriff's office were called in to witness the signing of the statement. As they watched, Martinez again read the statement to appellant in Spanish. Appellant stated he understood the statement and then signed it. The statement reflects that appellant signed it at 1:30 p.m. Appellant was taken before a magistrate later in the afternoon. Both Martinez and Garza testified that at no time did they threaten, coerce or make any promises to appellant in exchange for his confession.

Appellant testified at the hearing that he was eighteen years old at the time of his arrest. He testified that his educational background consisted of five years of school in Mexico. He testified that the officers coerced him into confessing by showing him a picture of the victim's body and telling him that if he did not confess they would show the picture to a jury and a jury would give him the needle. According to appellant, his rights were never explained to him and although his statement

was read to him in Spanish after he dictated it, he did not understand it.

Appellant asserts that the fact that he spent one night in solitary confinement, coupled with the fact that he did not speak English and was not taken before a magistrate until after he confessed, invalidates the voluntariness of his confession.

The trial judge is the sole judge of the credibility of the witnesses in a pretrial hearing on a motion to suppress. Absent a showing of an abuse of discretion, the trial court's findings will not be disturbed. Freeman v. State, 723 S.W.2d 727 (Tex.Cr.App. 1986); Cannon v. State, 691 S.W.2d 664 (Tex.Cr.App. 1985); Bonham v. State, 680 S.W.2d 815 (Tex.Cr.App. 1984). As the State correctly points out the trial court's findings are fully supported by the record. The mere fact that appellant may have been placed in solitary confinement certainly does not negate the voluntariness of his statement. Neither does the fact that he did not understand English. The record demonstrates that the investigators went to great lengths to translate everything several times to appellant in order to ensure that he understood what he was doing. Finally, the mere failure to take a defendant before a magistrate before interrogating him does not invalidate a confession. Williams v. State, 692 S.W.2d 671 (Tex.Cr.App. 1984). Absent a showing of a causal connection between an accused's confession and the failure to take the accused promptly before a magistrate, the validity of the confession is not affected. Williams v. State, supra (and cases cited therein). Appellant has made no such showing in the instant case. We find no abuse of discretion in the trial

court's decision concerning the voluntariness of the confession. Appellant's seventh point of error overruled.

In his twelfth point of error, appellant contends that the excusal of prospective jurors by personnel in the district clerk's office without benefit of the district judge hearing the excuses denied his right to a fair trial. Prior to trial appellant filed a challenge to the array alleging that the officers summoning the jurors had willfully summoned jurors in order to secure a conviction in that jurors were improperly excused by individuals in the district clerk's office. At a pretrial hearing held on June 2, 1986 immediately before the voir dire examination of the jury began, it was established that 700 jurors were summoned for jury duty in Cameron County's five district courts and two county courts at law for the weeks of May 27th and June 2, 1986. Pursuant to authority given them by the district judge, the court clerk for the 107th District Court, the district clerk, the chief deputy clerk and the jury clerk "rescheduled" several individuals who requested a postponement in their jury duty. The evidence reflected that sixteen individuals who were summoned for the week of May 27 were "rescheduled." Aurora De La Garza testified that from her paperwork it looked like most of those individuals came in on May 27th and requested to be "rescheduled." The usual practice for those wishing to be "rescheduled" was for the individual to go talk to the district judge who would then authorize the employee's of the district clerk's office to fill out the proper paperwork. However, occasionally the employees of the district clerk's office would "reschedule" someone without the district judge's specific consent. Of the sixteen people who were rescheduled from the May 27th panel, it was

impossible to tell who had talked to the district judge and been excused by him or who had been excused solely by an employee of the district clerk's office. However, De La Garza did testify that some of the sixteen individuals were excused without a district judge hearing their excuses. At the conclusion of the hearing, the trial court overruled appellant's challenge to the array.

We first must determine if appellant made a proper challenge to the array. Article 35.07,V.A.C.C.P., provides that:

> "Each party may challenge the array only on the ground that the officer summoning the jury has wilfully summoned jurors with a view to securing a conviction or an acquittal. All such challenges must be in writing setting forth distinctly the grounds of such challenge. When made by the defendant, it must be supported by his affidavit or the affidavit of any credible person. When such challenge is made, the judge shall hear evidence and decide without delay whether or not the challenge shall be sustained."

Article 35.06, V.A.C.C.P., provides:

> "The court shall hear and determine a challenge to the array *before* interrogating those summoned as to their qualifications." (emphasis added)

Article 35.12, V.A.C.C.P., sets out the procedure to be followed in testing the qualifications of the jurors:

> "In testing the qualification of a prospective juror after he has been sworn, he shall be asked by the court, or under its direction:

1. Except for failure to register, are you a qualified voter in this county and state under the Constitution and laws of this state?

2. Have you ever been convicted of theft or any felony?

3. Are you under indictment or legal accusation for theft or any felony?"

The record reflects that in accordance with Article 34.04, V.A.C.C.P., appellant was served on May 23rd with the list of the names of the persons summoned as prospective jurors for the week of May 27th. Then on May 27th the individuals on the list appeared for jury duty and were qualified in accordance with Article 35.12, supra. It is unclear from the record whether the prospective jurors were divided into panels for the respective courts on May 27th or June 2nd. But the record does show that the panel for apepllant's case reported to the trial court on June 2nd. At that time the court made brief remarks about the nature of the case and the parties and then asked the panel to fill out written questionnaires. While the panel was doing this, the court conducted the hearing on appellant's challenge to the array in another courtroom. After overruling appellant's challenge, the court resumed the voir dire examination of the panel. Initially after noting that the jury had been qualified pursuant to Article 35.12, supra, the previous week, the trial court again asked the panel the Article 35.12 questions. Receiving no affirmative responses from the panel, he continued with the voir dire examination.

As we said in Stephenson v. State, 494 S.W.2d 900 (Tex.Cr.App. 1973), we do not condone the practice of

allowing county employees to arbitrarily grant exemptions to jurors without the trial court's knowledge. However, since defense counsel did not bring the challenge to the array to the attention of the trial court until *after* the prospective jurors were initially qualified, we find that appellant waived his opportunity to challenge the array. Article 35.06, supra; Jackson v. State, 745 S.W.2d 4 (Tex.Cr.App. 1988); Esquivel v. State, 595 S.W.2d 516 (Tex.Cr.App. 1980).

In addition, after the court had overruled his challenge to the array, appellant's counsel made no effort to attach the absent jurors in compliance with Article 35.01, V.A.C.C.P. Ward v. State, 505 S.W.2d 832 (Tex.Cr.App. 1974); Stephenson v. State, supra. Consequently, appellant is not entitled to complain about prospective jurors being excused. Appellant's twelfth point of error is overruled.

During trial evidence showed that after the victim's body was found, authorities cut off the victim's fingers and sent them to the DPS lab in order that the victim might be identified. Photographs of the victims fingerprints were taken and then compared with fingerprints kept in the DPS files. Through this means, authorities learned the identity of the victim. During trial after this evidence was admitted, appellant made an oral motion asking that he be given a two day continuance for the purpose of having his own experts examine the photographs taken of the victim's fingerprints (the fingers were destroyed by a DPS lab technician on orders from one of the Cameron County investigators). The trial court denied appellant's motion. Appellant now complains that the trial court's refusal to grant the continuance was an abuse of discretion.

Because appellant's motion for continuance was neither in writing, Article 29.03, V.A.C.C.P., nor sworn to, Article 29.08, V.A.C.C.P., we are compelled to find that nothing has been presented for review. Lewis v. State, 664 S.W.2d 345 (Tex.Cr.App. 1984); Porter v. State, 623 S.W.2d 374 (Tex.Cr.App. 1981); Minx v. State, 615 S.W.2d 748 (Tex.Cr.App. 1981). Appellant's thirteenth point of error is overruled.

Having found no reversible error, we affirm the judgment.

McCormick, Presiding Judge

(Delivered May 24, 1989)
En Banc
Publish

EX PARTE IRINEO MONTOYA

WRIT NO. 23,999-01 Habeas Corpus Application From **CAMERON** County

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Art. 11.07, V.A.C.C.P.

Applicant was convicted of the offense of capital murder and sentenced to death on June 17, 1986. This Court affirmed applicant's conviction on direct appeal. Montoya v. State, 810 S.W.2d 160 (Tex.Cr.App. 1989). The trial court has scheduled applicant's execution to be carried out on or before sunrise, September 17, 1992.

In the instant cause applicant presents fifteen (15) allegations in which he challenges the validity of his conviction and resulting sentence. The trial court has entered findings of fact and conclusions of law and recommended the relief sought be denied.

This Court has reviewed the record. The findings and conclusions entered by the trial court are supported by the record and upon such basis the relief sought is denied.

IT IS SO ORDERED THIS THE 16TH DAY OF SEPTEMBER, 1992.

PER CURIAM

En banc
Do Not Publish
Clinton & Maloney, JJ., would grant stay.
Miller, Baird, Overstreet & Benavides, JJ., not participating.

CAUSE NO. 86-CR-68-B

THE STATE OF TEXAS	)	IN THE DISTRICT COURT OF
VS.	:	CAMERON COUNTY, TEXAS
IRINEO MONTOYA	)	138TH JUDICIAL DISTRICT

ORDER ON DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this date, the Court considered Defendant's Petition for Writ of Habeas Corpus and State's response thereto, with the proposed Findings of Fact and Conclusions of Law, and the Court, after due consideration of the claims, case-law, and requests, and having taken judicial notice of all records on file, will rule as follows:

FINDINGS OF FACT

1. Defendant's petition fails to reasonably show the existence of any fact or facts which would be material to the issue of the legality of his incarceration.

2. Defendant's Petition fails to show that any newly-discovered evidence, if it existed at the time of trial as he simply believes, was unavailable and/or undiscoverable by the defense through reasonable diligence.

3. Defendant's Petition fails to show that he was prevented from expressly offering evidence he has characterized herein as mitigating or offered and denied an opportunity to include an instruction for that purpose or that he raised those issues on direct appeal.

4. Most of the other claims and particularly Claims Nos. VI., at P. 34, Pp. 34-36, XVII and XVIII, at Pp. 54-58, were unfavorably disposed on direct appeal. *Montoya vs. State*, 810 S.W.2d 160 (Tex. Crim. App. 1991), *cert.den'd* 112 S.Ct. 426 (1991).

CONCLUSION OF LAW

1. There is no material, previously-unresolved issues of fact material to the legality of Defendant's incarceration, and there exists no need for an evidentiary hearing. Defendant's Application lacks any basis for relief under *Penry, et al.*

2. Most issues have been raised on direct appeal and those that have not been raised, the Defendant fails to show why they could not have been raised on direct appeal and, therefore, the Court precludes their being raised now.

It is, therefore, ORDERED that the Clerk of this Court shall prepare a transcript of all papers filed by Defendant, the State and the Court since 8:00 a.m., July 31, 1992, including his original Indictment, Guilt and Punishment Charges, Guilt and Punishment Verdict Forms, the Judgment of conviction and Sentence, and docket sheet, and transmit the same to the Clerk of the Texas Court of Criminal Appeals INSTANTER.

SIGNED FOR ENTRY: September 16, 1992.

/s/ Robert Garza
ROBERT GARZA
Judge Presiding

cc: Hon. John Olson
Hon. Donald Flanary
Court of Criminal Appeals
Texas Dept. of Criminal Justice –
Institutional Division

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60184

IRINEO MONTOYA,

Petitioner-Appellee,
Cross-Appellant,

versus

WAYNE SCOTT, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(OCTOBER 10, 1995)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR
THE COURT:

/s/ Emilio M. Garza
United States Circuit
Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

MANDATE

FROM

COURT OF CRIMINAL APPEALS

Austin, Texas

THE STATE OF TEXAS.

TO THE 107TH. JUDICIAL DISTRICT COURT OF CAMERON **COUNTY ___ GREETING:**

Before our COURT OF CRIMINAL APPEALS, on the 19th day of June A.D. 1991 the cause upon appeal to revise or reverse your Judgment between _____. IRINEO MONTOYA _____ Appellant ___,

CCRA No. 69,644

Tr. Ct. No. 86-CR-68-A

vs.

The State of Texas, ~~Appellee~~ ___,

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

The Appellant's Motion for Rehearing is Denied.

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, the HON. MICHAEL J. McCORMICK, Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 5th. day of July A.D. 1991

Thomas Lowe
Clerk.

/s/ Belva Myler
Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

IRINEO MONTOYA, *Petitioner,*	§	
v.	§	CIVIL ACTION
JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *Respondent.*	§	NO. B-92-145 (Filed Mar. 28, 1994)

JUDGMENT

This action came on for hearing before the Court, Honorable Filemon B. Vela, District Judge, presiding on the Petition for Writ of Habeas Corpus filed under 28 U.S.C. § 2254 on behalf of Petitioner Irineo Montoya, and the issues having been duly heard and a decision having been duly rendered, the decision of this court having been had and entered on February 4, 1994; and it appearing to the Court that Petitioner is detained by the Respondent James A. Collins, Director, Texas Department of Criminal Justice Institutional Division, in violation of the provisions of the United States Constitution,

IT IS ORDERED AND ADJUDGED that the Petition for a Writ of Habeas Corpus is conditionally granted, as follows:

1. Petitioner Irineo Tristan Montoya's conviction and sentence of death entered by the 107th Judicial District Court of Cameron County, Texas, under Cause No. 86-CR-68A, are vacated.

2. The State of Texas is granted a reasonable time within which to initiate proceedings to retry the Petitioner in a constitutional manner for the crime charged.

3. If the State of Texas fails to initiate proceedings to retry Petitioner within a reasonable time after this judgment is entered (or, in the event of an appeal, after mandate has issued from the Court of Appeals), or elects not to retry Petitioner then it must permanently discharge him from custody.

Dated at Brownsville, Texas, this 28th day of March, 1994.

/s/ Filemon B. Vela
THE HONORABLE
FILEMON B. VELA
United States District Judge

TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, Clerk
By /s/ Ed Leander
Deputy Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Texas statutory provisions involved are as follows:

Texas Code of Criminal Procedure § 37.071(d)(2):

> The court shall charge the jury that:
>
> . . .
>
> (2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree;
>
> . . . .

Texas Penal Code § 7.02(a)(2):

> A person is criminally responsible for an offense committed by the conduct of another if: (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid, the other person to commit the offense.

Texas Penal Code § 7.02(b):

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

The provisions of the United States Constitution involved are the Due Process Clause of the Fourteenth Amendment; the right to an impartial jury under the Sixth and Fourteenth Amendments; and the right to be informed of the nature and cause of an accusation under the Sixth and Fourteenth Amendments:

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation. . . .

Fourteenth Amendment

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

Rule 6 of the Rules Governing § 2254 Proceedings in the United States District Courts

> A party shall be entitled to invoke the processes of discovery available under the federal rules of civil procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so. . . .

STATE OF TEXAS
CAMERON COUNTY

AFFIDAVIT OF PATRICIA LOOMIS

1. My name is Patricia Loomis. I am fifty five years old. I was a juror in Irineo Montoya's trial for capital murder in Cameron County in 1986.

2. At some point during the trial (I believe it was during the guilt/innocence phase deliberations), another juror, who was a young, short, hispanic girl, and I were talking about where we were from and where we worked. This juror, whose first name is Norma and I believe her last name is Gonzalez, said she was working, or had worked, at the Yacht Club Restaurant in Port Isabel.

3. When I learned that Ms. Gonzalez worked at the Yacht Club Restaurant, I mentioned that the victim was from South Padre Island and might have frequented the restaurant. I asked Ms. Gonzalez if she had ever met him. She responded that she had known him and, in fact, had known him for a while. I got the impression that Ms. Gonzalez had known him personally because, for one thing, she referred to him by his first name. I then asked her how she got on the jury if she knew the victim since we had been asked about that before we were selected, but she would no longer talk about it.

4. At one point, Ms. Gonzalez said she was not sure she believed in the death penalty and she also told me that she believed criminals could be rehabilitated. On the other hand, Ms. Gonzalez was one of the first to say the defendant deserved the death penalty. In fact, the main

reason I am coming forth with this information is because I had the impression she may have been biased towards awarding the death penalty due to her personal connection with the victim.

5. At some point during the guilt/innocence phase, I and three other jurors were either on our way to, or back from, lunch, when the driver of the car told us we were driving through the park where the murder had taken place. I told them that we were not supposed to be there and we continued on our way. We were on the street that goes through Ringgold Park, across from Gladys Porter Zoo. I had never heard of Ringgold Park prior to the trial. That was the first and only time I have ever been through Ringgold Park.

6. One of the other jurors riding in the car may have been Maggie Aguilar and one of them may have been Norma because we often went to lunch together. It has been seven years since the trial so I can't say with absolute certainty if it was Maggie and Norma who I was riding with in the car.

I hereby swear that the foregoing is true and correct to the best of my recollection and I so state under the pains and penalties of perjury.

/s/ Patricia T. Loomis
Patricia Loomis

Subscribed and sworn to before me on this 12 day of October, 1992.

/s/ Joseph D. Ward
Notary Public